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Secaucus, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MHA, LLC d/b/a MEADOWLANDS HOSPITAL MEDICAL CENTER	**Cases**	**22-CA-086823**
		22-CA-089716
		22-CA-090437
and		**22-CA-091025**
		22-CA-091521
		22-CA-092061
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HEALTH PROFESSIONAL AND ALLIED EMPLOYEES, AFT/AFL-CIO		**22-CA-097214**
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***Benjamin W. Green and Saulo Santiago, Esq., for* the General Counsel.**
Jeffrey J. Corradino and Richard W. Schey, Esqs.
***(Jackson Lewis, P.C.) ,* Morristown, NJ, and**
Robert L. Mulligan, Esq. (Hartmann, Doherty, Rosa,
***Berman, Bulbulia, LLC),* River Edge, NJ, for the Respondent.**
***Lisa Leshinski, Esq*., Haddon Heights, NJ, and**
***Emma Rebhorn*, Esq., Emerson, NJ, for the Union.**

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on charges and amended charges filed by Health Professional and Allied Employees, AFT/AFL-CIO (Union), a complaint was issued against MHA, LLC d/b/a Meadowlands Hospital Medical Center (Respondent, Hospital or Employer) on September 30, 2013.[1] The complaint was amended thereafter.

The Union represents a unit of registered nurses (RNs), and a unit of technical employees and a unit of service employees. Separate collective-bargaining contracts cover the registered nurses, the technical unit and the service unit.

The complaint alleges that the Respondent (1) threatened employees with the closure of the Rehabilitation Unit if employees engaged in union activities (2) threatened not to reach agreement with the Union on any issues if the Union did not cease a media campaign and (3) failed and refused to furnish the Union with an accountant's report for 2011 and 2012, the DNV Inspection Report, and information concerning Veritas.

[1] The filing dates of the charges are set forth in the complaint.

It is further alleged that the Respondent (4) failed to continue in effect all the terms and conditions of the RN contract by refusing to apply the RN contract to nurse interns (5) selectedemployees to be laid off without giving the Union an opportunity to bargain with it with respect to the criteria used for selecting employees to be laid off and without affording the Union an opportunity to bargain over the effects of the layoffs (6) assigned the work of Service unit employees to non-unit per diem employees without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent regarding such conduct (7) failed to continue in effect all the terms and conditions of the RN and Technical contracts by implementing new employee medical plans that were not "substantially comparable" to its former medical plans (8) failed to continue in effect all the terms and conditions of the RN and Technical contracts by eliminating employees' 12 hour shifts (9) failed to continue in effect all the terms and conditions of the RN and Technical contracts by refusing to make contributions to employees' 401(k) plans (10) failed to continue in effect all the terms and conditions of the RN and Technical contracts by failing to allow Union representatives to meet with employees in the cafeteria (11) failed to continue in effect all the terms and conditions of the RN and Technical contracts by failing to offer bumping and recall rights to laid off employees (12) failed to continue in effect all the terms and conditions of the RN and Technical contracts by changing the bumping provisions in those contracts and (13) failed to continue in effect all the terms and conditions of the Service Contract by refusing to apply that contract to hospital assistants and nursing assistant interns.[2]

The Respondent filed answers to the complaint as amended and asserted certain affirmative defenses, as amended. A 33 day hearing was held before me from December 10, 2013 to May 27, 2016 in Newark, NJ.[3] Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following:[4]

Procedural Issues

The Alleged Lack of a Board Quorum and The Alleged Violation of the Federal Vacancies Reform Act

On May 11, 2016, the Respondent filed a motion to dismiss the complaint on the ground that Regional Director Michael J. Lightner issued the amended complaint at a time when then-Acting General Counsel Lafe Solomon was serving in violation of the Federal Vacancies Reform Act (FVRA) and lacked authority to delegate the power to Director Lightner to issue the amended complaint.

Following the close of the hearing, Counsel for the General Counsel filed a Notice of Ratification dated July 14, 2016, signed by General Counsel Richard F. Griffin, Jr.

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[2] Certain allegations of the complaint were settled before and during the hearing, and are not before me, and are not set forth here.

[3] The hearing record comprised 3776 pages, and 468 exhibits. The Respondent's unopposed motion to correct the record is granted.

[4] Two motions to dismiss were filed shortly before the close of the hearing. They are be discussed below. In addition, the Respondent filed with the Board a request for special permission to appeal three of my Orders. On August 22, 2016, the Board issued its Order on the Respondent's request. It is discussed below.

The Notice of Ratification states in relevant part: "I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act…. For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint."

In the Notice, General Counsel Griffin requested that the Notice of Ratification be placed in the record. It is hereby received in evidence as G.C. Exhibit No. 248.

In *Burndy, LLC,* 364 NLRB No. 77, slip op. at fns. 1 and 2 (2016), the Board, citing *Bloomingdale's, Inc.,* 363 NLRB No.172, slip op. at 2 fn. 4 (2016) and *Pallet Cos., a subsidiary of IFCO Systems, N.A., Inc.*, 361 NLRB No. 33 (2014), rejected the respondent's arguments that the authority of the General Counsel and Regional Director to investigate and prosecute that case lapsed during the period when the Board lacked a valid quorum.

The Board found that General Counsel Griffin's "ratification of the issuance and continued prosecution of the complaint in this matter has rendered moot any argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter."

The Board, citing *The Boeing Company*, 364 NLRB No. 24, slip op. at 1 fn. 1 (2016) and *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 9 fn. 19 (2016) also rejected the respondent's argument that the investigation and prosecution of those cases was invalid because former Acting General Counsel Solomon was not properly appointed under FVRA. See also *Somerset Valley Rehabilitation & Nursing Center,* 364 NLRB No. 43, slip op. at fn. 2 (2016).

In view of the General Counsel's Notice of Ratification filed in this case and the Board's decisions, above, upholding identical notices of ratifications and rejecting similar arguments made by respondents in those cases, I deny the Respondent's motion to dismiss.

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a limited liability company having an office and place of business in Secaucus, New Jersey, has been engaged in the operation of a hospital providing medical care. The Respondent derives gross revenues in excess of $250,000 and has received at its facility goods valued in excess of $5,000 directly from locations outside New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II.The Facts

A. Background

The Respondent operates a five-floor, 231 bed community-based for-profit hospital providing perioperative inpatient and outpatient services. It provides care in medical-surgical specialties (med-surg), an Intensive Care Unit (ICU), Labor and Delivery (L&D), Pediatrics,

Radiology, Laboratories, Post Anesthesia Care Unit (PACU), Operating Room (OR), and an Emergency Department (ER).

The hospital facility was owned by the Liberty Health System. On December 7, 2010, the Respondent purchased the assets of the hospital from Liberty. At the time of the purchase, the Union represented the unit employees described above and had collective-bargaining contracts with Liberty for the three units for 10 years. Upon its purchase of the Hospital, the Respondent recognized the Union and signed contracts with the Union effective December 7, 2010.

The Respondent's partners are Dr. Richard Lipsky and Tamara Dunaev. Dr. Lipsky is the chairman of the Hospital's board of directors. Dunaev is an owner of the Respondent and vice chair of the board of directors. She oversees the overall performance of all the hospital's departments. Thomas Gregorio was the president and chief executive officer during the times at issue. Felicia Karsos was the chief nursing officer and Donna Ortiz was the Director of Nursing. Gloria Kunish, the Director of Human Resources, was replaced by Mario Pavisic, who was replaced by Elizabeth Garrity on November 1, 2012.

B. The Alleged Threats to Employees

1. Dr. Lipsky

The complaint alleges that the Respondent, by Dr. Lipsky, threatened not to reach agreement with the Union on any issues if the Union did not cease a media campaign.

On April 3, 2013, a meeting was held at the Department of Health (DOH) at the Hospital's request, in order to discuss the Union's concerns and attempt to resolve the differences between the parties. In attendance were Dr. Lipsky, Dunaev, Union president Ann Twomey and Union representative Carlton Levine. The meeting immediately became confrontational with the Union questioning the Respondent's compliance with its contracts and state regulations, staffing issues and its financial status.

The meeting took place in the context of a bitter relationship between the parties relating to layoffs, discharges, disagreements over seniority rights, class action grievances, Union publicity of alleged Hospital mismanagement, and other issues discussed below.

Twomey recorded the meeting in which Dunaev stated that the Union was promoting a "negative campaign … negative publicity" in which it made false statements. Dr. Lipsky noted that "every time there is a negative article and God knows, union engineered and initiated a flood of negative articles. We suffered tremendously because our admissions go down, our census go [sic] down, the nurses get laid off as a result."

Dr. Lipsky told the Union that the Hospital wanted to have "peace," resolve all their differences and "move on together." Twomey asked how their differences could be resolved. Dr. Lipsky replied "you cease the hostilities you shut up immediately because you feed it -- it's a feeding frenzy. We [sic] getting article after article." Twomey again asked what the resolution would be – "not go to the newspapers?" Dr. Lipsky replied "no, you stop first and then together we can move on and resolve every single issue you have on the table." Twomey asked "and if we don't – you're not going to resolve anything?" Dr. Lipsky answered "if you do not cease the media campaign we will never come to any agreement. Every issue will have to go to the NLRB."

Discussion

The Respondent concedes that "Dr. Lipsky's willingness to settle [pending issues] was conditioned upon the Union's agreeing to cease what he believed was an unlawful media campaign that was designed to 'smear', 'besmirch' and disparage Respondent." Brief p. 37.

As set forth fully below, the Union enlisted the media in its campaign against the Respondent's alleged mismanagement and alleged improper practices. The Respondent believed that the Union's efforts in this regard hurt its finances, standing and reputation.

However, as set forth below, there was nothing unlawful in the Union's use of the media to publicize its belief concern the Respondent's course of conduct.

The Respondent clearly conditioned its reaching agreement on the Union's discontinuance of its partnership with the media to broadcast its message. Such a comment constitutes an unlawful threat that the Respondent would not agree to any issues if the Union continued its media campaign. *Vincent M. Ippolito, Inc*., 313 NLRB 715, 72 (1994).

However, there is no evidence that employees were present at the meeting when Dr. Lipsky made his comment. Nor was there evidence that his comment was disseminated to employees.

I accordingly cannot find that employees' rights were interfered with by Dr. Lipsky's comment. *Branch International Services, Inc*., 310 NLRB 1092, 1106 (1993) and I therefore find that no Section 8(a)(1) violation was committed.

2. Tamara Dunaev

The complaint alleges that Dunaev threatened employees with closure of the Rehabilitation Unit if employees engaged in union activities.

In September, 2012, the Union issued a 23 page "white paper" entitled "Meadowlands Hospital and the State of New Jersey: Failures of Oversight Put Profits Before Patients at a Community Hospital." The white paper discussed the "character and competence of the MHA Principals," enumerated alleged violations by the Hospital, questioned the financing and ownership of the Hospital, and noted "warning signs" concerning the purchase of the Hospital. It listed companies with links to the Hospital or its principals, and the names of its individual passive investors. It also urged "stronger oversight" by the DOH over the Hospital.

A Union press conference was scheduled for October 2, 2012. A few days before the conference, on September 28, a labor/management meeting was held at the Hospital attended by Joanne Dudsak, the local union president, Levine and Karsos,

Dunaev entered the meeting stating that the Union's members were "no good, they were problems, in trouble for lateness, calling in sick, being brought up on charges, these are your upstanding members; you have members who are throwing away specimens, always getting in trouble, your chosen people." Dudsak replied that she did not hire the Union's members, but that her responsibility was to protect them.

Dudsak testified that Dunaev said "if you continued going to the media with these situations that we were causing the hospital bad press and we were going to lose patients. And every time this happens it causes us to lose more patients, and that if we didn't stop that they may have to close the Rehabilitation center. You need to stop this thing on Tuesday," referring to the press conference concerning the Union's white paper.

Dudsak further quoted Dunaev as saying that "every time we go to the media it becomes an issue and a problem. It hurts the patients, the census, and all the employees. It hurts everyone and it could cost people their jobs." Dudsak answered that she wanted the Hospital to do well so that the workers maintained their jobs. Dunaev answered "this may cause the Rehabilitation center to close because the census is low there if this publicity continues in the newspapers."

Dudsak's affidavit reads that Dunaev said that "we have no patients and every time the union goes to the media it lowers our census. This hurts everyone, including the employees. Do you want to see the hospital close? Dunaev said something about closing the Rehabilitation unit. I don't know whether her words were this is going to affect the Rehabilitation unit, or this is going to close the Rehabilitation unit. I am not certain now what Dunaev said concerning the Rehabilitation unit."

Levine quoted Dunaev as saying that when the Respondent bought the Hospital, many new patients sought care there, but the nurses complained that they were working too hard. As a result, the physicians stopped admitting new patients which hurt the Employer. Dunaev also said that the Union filed complaints with the DOH which led to many inspections, adding "every time the Union did something it led to a reduction in patients in the hospital." She noted that the October 2 press conference would be "bad for the hospital." It would "have to close the inpatient Rehabilitation unit if this press conference went forward."

Levine further quoted Dunaev as saying that "every time you do something like this the census will go down." He stated that Dunaev believed that the Union's conduct may cause prospective patients to hesitate before seeking care at the Employer. As she left the meeting on September 28, Dunaev said "the event on Tuesday would be bad for the hospital and would lead [it] to further eliminate bargaining unit positions, as a result a layoff of employees, closure of services and particularly the Rehabilitation unit." Levine testified that Dunaev said that if the Union "went forward with the event" on October 2, the Hospital would be closing the Rehab center.

Karsos testified that Dunaev spoke about the negative comments in the press and the impact that had on the Hospital's census. She stated that each time there is a negative comment in the press there is a drop in the census. Karsos quoted Dunaev as "speaking about the impact of the negative press around the hospital and the impact on census. And, in fact, the census in the Rehab unit was experiencing a decline and we were going to close the Rehab unit."

Dunaev testified that she entered Karsos' office to inquire about an accident in the cafeteria and then asked about the nature of the meeting, and when she was told, asked to participate. Levine introduced himself and she told him that she was happy that he was present as she wanted to express her concerns, adding that she had been attempting to contact the Union leadership for two months without success. She then accused Levine of "bashing" the Hospital without giving it the opportunity to meet and discuss any issues the Union had so that they could resolve them. She told Levine that whatever he had already done was "hurtful and damaging" to the Respondent, noting that the census dropped and the Rehabilitation unit is "not doing well" because the Hospital lost its sources of referrals. In that respect, Dunaev said that outside sources of referrals who send patients for Rehabilitation did not do so because of the "bad press" that the Hospital is unsafe. She further told Levine that whatever he has done or planning to do is "not productive." She offered to meet with him and discuss their differences. She asked Levine to advise Twomey of her remarks.

Dunaev stated that at the time of the meeting she did not know that the Union would hold a press conference four days later on October 2.

In late October, 2012, the Union was notified of the closing of the Rehabilitation center, and one month later, on November 1, 2012, it was closed.

Discussion

As set forth in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969):

> An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefits." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

I credit the testimony of Levine and Dudsak who both stated that Dunaev tied the closure of the Rehabilitation Center to the Union's publicity campaign. Although Dunaev mentioned the reduction in the census of the center as a reason for its possible closing, Karsos' testimony made clear that Dunaev connected the decline in the census and the Rehab center's closing to the Union's lawful publicity campaign.

Both Dudsak and Levine quoted Karsos as saying that the press conference must not be held or the Rehab center would close. It is significant that the conference was held, publicity continued and, weeks later, the Rehab center was closed. Dunaev's statement that the Rehab center would be closed was made in the context of her criticism of the Union's lawful activity of advertising its dispute with the Respondent in a press conference.

The Respondent has not proven that the Rehab center was closed because of a low census of patients. The fact that it did close only weeks after Dunaev's remarks to Levine and Dudsak, strongly supports a finding that Dunaev made the threat attributed to her. The press conference was held and thereafter the Rehab unit was closed.

Thus, Dunaev attributed the anticipated closing of the Rehab center to the Union's protected activity of holding a press conference related to the Union's dispute with the Respondent.

Under *Gissel*, it is the Respondent's burden to show that Dunaev's statement was justified by objective evidence. *Schaumburg Hyundai*, 318 NLRB 449, 450 (1995); *see also Zim's Foodliner, Inc. v. NLRB,* 495 F.2d 1131, 1137 (7th Cir. 1974) in which it was held that *Gissel* places a "severe burden" on employers seeking to justify predictions concerning the consequences of unionization. *Gissel* requires more than a mere belief to make such a prediction lawful, because "employees, who are particularly sensitive to rumors of plant

closings, take such hints as coercive threats rather than honest forecasts." *Gissel,* 395 U.S. at 619-620. Here, Dunaev simply told the Union's agents that the census in the Rehab unit had declined and that the Rehab unit would close. She made this statement without offering specific, objective evidence that the census was reduced, and as a result of that reduction the Rehab Center would close.

The Respondent argues that Levine's testimony should not be credited because of allegedly contradictory comments he made to the Union's staff by email that day. The email related Dunaev's statement at the meeting at which Dunaev "implied that they would have to close the Rehab unit that only has 5 patients and 20 union employees if we went forward." But at hearing, when asked if Dunaev only implied that the Rehab unit would be closed, he testified that "what she said was… the consistent train of thought was the press conference … if we went forward with the press conference, it would hurt patient census and they would be closing… they would have to close the Rehab unit."

Moreover, even assuming that Dunaev implied that it would have to close the Rehab center as testified by Levine, or that the Union's actions may cause it to close, as testified by Dudsak, her comments nevertheless are unlawful threats. In *Daikichi Corp.,* 335 NLRB 622, 624 (2001), the Board, in finding a violation in the respondent's threat to shut its operation if the employees selected union representation, stated:

> It is no defense that [the respondent's official] phrased his prediction of plant closure as a possibility rather than a certainty. In *Gissel* itself, the employer's unlawful statements were to the effect that the union would probably strike and that a strike "could lead to the closing of the plant." 395 U.S. at 588. See also *McDonald Land & Mining Co.,* 301 NLRB 463, 466 (1991) (finding statement that creditors, upon learning that employees favored unionization, "might get nervous and decide to throw us [into] Chapter 11" violated Sec. 8(a)(1)); *Glasgow Industries,* 204 NLRB 625, 626-627 (1973) (finding statement that "if you all vote this Union in, this plant could move to Mexico" violated Sec. 8(a)(1)); *Mohawk Bedding Co.,* 204 NLRB 277, 278 (1973) (finding that in the context of statements of plant closure, the statement "[i]f the Union wins the election tomorrow … then we could all be in for serious trouble," violated Sec. 8(a)(1)).

I find, as alleged, that the Respondent, by Dunaev, threatened employees with closure of the Rehabilitation unit if employees engaged in union activities.

C. The Alleged Refusals to Bargain

1. The Alleged Failure to Provide Information

The complaint alleges that the Respondent failed and refused to provide the Union with the Independent Qualified Public Accountant's Report for 2011 and 2012, the DNV Inspection Report, and information concerning Veritas. It is alleged that the information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the units.

The Accountant's Reports

On February 4, 2013, Levine wrote to Garrity asking for the Independent Qualified Public Accountant's Report for 2011 and 2012. The letter stated that the Union required this information to ensure that its members are being provided the health insurance coverage guaranteed by the contract and to ensure that the amounts that they contribute to that coverage are correct.

Levine testified that the Union sought this information because ERISA requires it to be disclosed as part of an employer's annual filing and such information is also required by Employee Benefits Security Administration. He stated that the document would have helped the Union verify that the rates its members were charged for health insurance deductions were correct because the contract provides that the members contribute a certain percentage of the premium. He stated that the Union received no response to this request.

Joseph DiBella, a principal with an employee benefits firm, gave uncontradicted testimony that no independent qualified public accountant's report was prepared for the Respondent for the years 2011 and 2012. He further stated that such a report was not required because the Respondent's medical plan funded its benefits from its general assets and not a trust. A report is only required where the plan is funded from a trust.

Inasmuch as DiBella gave uncontradicted testimony that the accountant's report did not exist, it cannot be provided to the Union. No discussion is therefore necessary as to whether the nonexistent report is necessary to the Union's performance of its representative duties.

The DNV Inspection Report

DNV is a company which performs accreditation surveys of hospitals. According to Levine, DNV is authorized by the U.S. Government to perform such surveys which are required for the receipt of federal government funds for reimbursement of patients receiving Medicare and Medicaid benefits. DNV performs an annual survey in which it examines the Hospital and seeks to ensure that the Hospital is in compliance with its standards for nursing services

In February, 2013, DNV performed the survey that was later requested by the Union. Levine testified that that month he received an email through Dudsak from Lynn McVey, a Hospital official, in which she thanked the staff for the excellent survey result. It stated that "the 14 new findings of this inspection will become our Play Book for 2013's improvement. … We know what is working well, and we know what doesn't work well… yet. The good news is we will use the same evidence-based management practices we are using now. I will be converting our findings in to an EBM monitor which we will continuously track so that maybe next year we can become an ISO-certified hospital. I want that flag!"

Levine wrote to the Respondent on March 15, 2013 requesting a copy of the February, 2013 DNV inspection report. The letter stated that the report was needed "to properly perform and police the collective-bargaining agreement."

Levine testified that the Union sought that report because the Employer intended to use the report to change its operations which, in turn, would impact the terms and conditions of employment of employees. The Union did not receive the report or any response to its request.

Dunaev stated that the report contained the results of a five or six day inspection in which DNV examined all areas of the Hospital's operations in an extremely detailed manner. She stated that it contained professional information designed for the Hospital's professionals to

make changes, fix deficiencies and implement improvements. She called it a "working tool for the hospital staff and management."

Dunaev admitted that the Hospital did not provide the report to the Union. She testified that in view of the Union's history of creating negative publicity through the media, legislature, government regulators and advocacy groups, she believed that the Union would not use it for "good reasons" and did not believe that the report would be "treated objectively." She did not offer the Union a confidentiality agreement to limit its use.

Discussion

The Respondent argues that the report (a) contains information not related to the bargaining unit and is therefore not presumptively relevant (b) the Union did not establish that it was necessary for the performance of its representative duties and (c) the request was not made in good faith.

The Respondent may be correct in arguing that the report contains information not related to the bargaining unit. However, it is abundantly clear that it also contains information related to the unit. Thus, Dunaev that the five or six day "extremely detailed" inspection examined "all areas of the Hospital's operations" including an inspection of the charts containing personnel files.

Similarly, Karsos testified that the inspectors examine whether the Hospital provided an orientation for the nurses in order to determine whether they are familiar with their department and hospital policies. The examiners must ensure that the Hospital has trained its nurses in the administration of patient care. Hospital management must satisfy the inspectors that the Hospital is compliant, for example in nursing services – that procedures are in place and that they are followed. Nursing management must provide the nurses' files to demonstrate that the nurses are licensed, that medical records are authenticated by the person providing care.

In this regard, Levine testified that in September, 2013 he was told by Karsos and Garrity that the DNV report mentioned that many unit nurses had not been recertified in certain areas or had not given such information to management. The two managers said that they were working to update the credentials and sought the Union's help in order to avoid issuing discipline to the nurses for their failure to recertify or notify the Hospital that they had done so. This demonstrates clearly that the report contains at least in part, information related to the bargaining unit.

Dunaev may also be correct that the report is designed for the Hospital's professionals to make changes, fix deficiencies and implement improvements. However, in calling the report a "working tool for the hospital staff and management," Dunaev established that the report was for the staff's use in implementing the report's recommendations to make changes, fix deficiencies and implement improvements.

It is axiomatic that an employer has an obligation to furnish to a union, on request, information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); and *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Information requested dealing with bargaining unit employees is presumptively relevant. *International Protective Services,* 339 NLRB 701 (2003). The standard of relevance is "a discovery--type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). This standard was endorsed in *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1951), as "[a]ny less lenient rule in labor disputes would greatly hamper

the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant…"

Here it is obvious, both through McVey's note to the staff and the testimony of the Respondent's witnesses that the DNV report related to the unit employees and was therefore presumptively relevant.

In *Olean General Hospital*, 363 NLRB No. 62, slip op. at 3 (2015), the Board held that the union was entitled to a report of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) regarding its survey of that hospital . The JCAHO conducts surveys of hospital facilities similar to that conducted by DNV, both for the purpose of certifying that they are in compliance with health and patient care standards.

In *Olean*, as here, the respondent claimed that the Union did not establish a specific need for the document. As in Olean, Levine could hardly specifically state in what express way the survey would be of use to the Union inasmuch as was refused a copy.

As found by the Board in *Olean*, "we do not find [the union agent's] inability to identify specific relevant information in the survey to be significant in the circumstances of this case. The inability to identify specific relevant information in the report can hardly be held against the Union, which has never seen the report. By contrast, the Respondent has seen the report and knows what is in it; accordingly, it had ample opportunity to show that the information contained in the report would be of no benefit to the Union, if that is in fact the case. Yet at the time the request was made, the Respondent did not oppose the Union's information request on relevance grounds but it simply ignored the request."363 NLRB, slip op. at 10.

It was sufficient here that Levine told the Respondent that the Union intended to use the report to properly perform and police the contract. He did not know what the report contained because he had not seen it. The probable relevance to the Union was established when, at hearing, Levine cited McVey's note to the staff that the survey's 14 new findings would become the Hospital's "playbook for 2013's improvement" and in doing so would use is "evidence based management practices." Clearly, the Respondent intended to use the report's findings to implement, its "playbook" improvements in the hospital's operations. Such changes would undoubtedly involve the Union-represented employees. It was just such a possible impact on employees that Levine properly sought to discover by being furnished the report.

Levine's request for the information based upon his need to perform and police the contract, was made all the more relevant by McVey's intent to use its findings to make "improvements" using its "evidence-based management practice" then in effect.

The Respondent claims that it denied the report to the Union because Dunaev believed that the Union's request was not made in good faith, and that the Union would not use it "for good reasons" and that it would not treat the report "objectively." First, the Union was entitled to the report. Second, the report's data was just that – an objective analysis of the Hospital's operations performed by an impartial survey committee. However the Union portrayed the findings, the findings were what they were.

First, if the Respondent had concerns about the Union's use of the report it did not make those concerns known to the Union. If it sought to keep the report confidential it did not make that claim to the Union and did not seek to negotiate any confidentiality measures.

A request for information must be made in good faith. It "is not just that the respondents show union bad faith, but that they show that the only purpose for the request was a bad-faith

purpose. Thus even if respondents had met their burden in showing that the request was made in bad faith, the existence of even one legitimate purpose would nonetheless render the request valid." *Six Star Cleaning & Carpet Services,* 359 NLRB No. 146, slip op. at 12 (2013); Furthermore, the presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown. *Hawkins Construction Co*., 285 NLRB 1313, 1314 (1987).

The Union had at least one good faith reason for requesting the DNV report. The report, which examined the operations of the hospital and its employees, could be expected to impact the employees' terms and conditions of employment. McVey said that she would use it to make improvements in the Hospital's operations. Levine's justification, at the time that he made the request, was to police and enforce the contract. As later confirmed by McVey's message, Levine expected to monitor and police any "improvements" in the Respondent's "playbook" as it affected its employees.

Significant to our case, in *Beverly Health and Rehabilitation Services, Inc*., 328 NLRB 885, 889 (1999), the Board held that the union's request for information was made in good faith notwithstanding the employer's contention that it was made in bad faith due to the union's publication of "Bad Care at Beverly" a document in which, according to the employer, the union disparaged and vilified Beverly.

I accordingly find and conclude that the Respondent violated the Act by failing and refusing to provide the DNV inspection report to the Union.

Information Concerning Veritas

In early February, 2013, Levine was sent an email containing lists of new employees scheduled for orientation. Those employees included the medical assistants, ultrasound techs, receptionist and front desk person who were listed in the "Veritas" department. Levine concluded from this that those employees who occupied unit titles had not been reported to the Union as union members. He also learned that Veritas employees were working in certain outpatient clinic areas of the Employer.

The Union obtained the Certificate of Formation filed by Veritas with the State of New Jersey. It listed Veritas Health Management, LLC as being formed in May, 2012, and listed the Hospital as its registered agent, its office as having the same address as the Hospital, and its members/managers as Dr. Lipsky and Dunaev.

On April 17, 2013, Levine asked for detailed information concerning the alleged alter ego or single employer relationship between the Employer and Veritas. The letter noted that "the union is concerned that an alter ego or single employer relationship may exist between this company and Veritas. The union has received reliable information that would suggest the existence of such a relationship. In order for the union to verity this relationship, the union needs the following information…."

On April 22, Garrity denied the request, stating that the information requested was "confidential and privileged," explaining that the facts that the Union is "concerned" and has "reliable information" does not entitle the Union to such information.

Levine replied on May 23, stating that the Union believed that the Hospital and Veritas have an alter ego and/or single employer relationship. He asked Garrity to tell him which part of his request was confidential or privileged, and offered to negotiate terms under which the

Union's need for the data could be accommodated with the Employer's need for confidentiality so that both needs may be met. Garrity simply responded that his request was denied.

At hearing, Levine stated that the information he had, but did not specifically disclose to the Respondent at the time he wrote the April 17 and May 23 letters, were the list of employees including the "Veritas" department workers, and the Certificate of Formation.

Dunaev testified that in 2012 medical assistants worked in the Hospital for the physicians who belonged to a multi-specialty physicians group which was not owned by the Respondent and not employed by the Respondent. She stated that she is an owner of Veritas with Dr. Lipsky and two others. She did not know who Veritas employed.

Dunaev noted, however, that despite the separate relationship of those workers to the Hospital, the employees of Veritas do not wear a different identification badge or uniform than that worn by employees of the Hospital. She stated further that employees of Veritas and the Hospital attend the same orientation programs, but share no other incidents of employment. She also noted that Veritas, which has been located within the Hospital since about 2012, provides a broad range of customer service. It ceased hiring medical assistants in 2013 or 214.

Levine testified that in the summer of 2013, he told Garrity and Karsos that a nurse told him that a nurse was given a full-time position in the outpatient oncology unit that had not been posted. Levine told the Employer's agents that the position must be posted to permit bidding for it. Levine was told that Veritas employees were staffing those clinics.

Karsos replied that there were no full-time positions, that the unit or clinic was just opened and one of the nurses was sent to that unit to help it get started, but once the unit was in full operation the Employer would post any position required. Veritas operates a medical clinic in the Hospital which includes physician visits, general practitioners, pediatrics, and a general family-type clinic. Garrity does not participate in the hire of Veritas employees. Veritas' human resource person, who has an office at the Employer, has that responsibility.

Discussion

"When union requests information relating to an alleged single-employer or alter-ego relationship, the union bears the burden of establishing the relevance of the requested information. A union cannot meet its burden based on a mere suspicion that an alter-ego or single-employer relationship exists; it must have an objective, factual basis for believing that the relationship exists. Under current Board law, however, the union is not obligated to disclose those facts to the employer at the time of the information request *Cannelton Industries, Inc*., 339 NLRB 996, 997 (2003).

Where, as here the requested information was not presumptively relevant, the union had the burden to establish the relevancy of the requested information "as an aid to investigation of a contract violation*." M. Scher & Son*, 286 NLRB 688, 691, 1987 WL 89945, at *6

As the Board stated in *McCarthy Construction Co*., 355 NLRB 50, 51–52 (2010):

> When a union requests information pertaining to a suspected alter-ego relationship, the union must establish the relevance of the requested information. A union cannot meet its burden based on a mere suspicion that an alter-ego relationship exists; it must have an objective, factual basis for believing that the relationship exists. See *M. Scher & Son, Inc.*, 286 NLRB 688, 691 (1987).

> Under Board law, the union is not obligated to disclose those facts to the employer at the time of the information request; neither is the union obligated to show that the information which triggered its request was accurate or even ultimately reliable. Rather, the General Counsel need only demonstrate at the hearing that the union had, at the time of the request, a reasonable belief, based on objective evidence, that such a relationship exists. See generally *Cannelton Industries*, 339 NLRB 996, 997 (2003), and cases cited therein.

In *Island Architectural Woodwork, Inc*., 364 NLRB No. 73, slip op. at 4 (2016), the Board stated:

> To determine whether two employers are alter egos, the Board considers several factors, including whether they have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers. No single factor is determinative, and not all are necessary to establish alter ego status. Unlawful motivation is not a necessary element of an alter-ego finding, but the Board does consider whether the purpose behind the creation of the suspected alter ego was to evade another employer's responsibilities under the Act. The burden to establish an alter ego relationship rests with the General Counsel. (citations omitted)

In *McCarthy Construction*, above, the Board stated that because that case involved an information request, it did not have to determine whether an alter-ego relationship actually existed between the two companies, but only whether the Union had a reasonable, objectively-based belief that such a relationship existed. Citing evidence including that employees of one company worked alongside employees of the other company and the employees of one company used the business address of the other company, the Board found that the union had such a belief and that the Respondent unlawfully refused to furnish the requested information. .

The Respondent faults Levine for not "disclosing the relevancy of the information … contemporaneous with its request…." (Brief, p. 51). However, Levine was not required to disclose the information he had at the time of his requests on April 17 or May 23, or their relevance. He was only required to demonstrate at the hearing that the Union had, at the time of the request, a reasonable belief, based on objective evidence, that such a relationship exists. McCarthy Construction, above.

At the time Levine made his two requests, he had the list of employees ostensibly employed by Veritas who were apparently performing work in the same unit as employees covered by the contracts but listed in the "Veritas" department , and an official document filed with the State listing the Hospital as the registered agent of Veritas, its office as being located at the Hospital, and its members/managers as Dr. Lipsky and Dunaev.

Further evidence adduced at the hearing showed that (a) Levine was told that an employee apparently employed by Veritas was working in the oncology department and which position was not posted as being available for unit employees and (b) the Veritas employees wear the same identification badge and uniform as those worn by employees of the Hospital and attend the same orientation programs.

I find that, by the time Levine made his two requests, he had a reasonable belief, based on objective evidence, that an alter ego or joint employer relationship existed between the Hospital and Veritas.

Thus, the management of the two entities are the same. Based on the Certificate of Formation, the sole managers of Veritas were Dr. Lipsky and Dunaev. Dr. Lipsky and Dunaev were the two partners in the ownership of the Respondent. The registered agent of Veritas was listed as being the Respondent, and its office is located at the Respondent's address.

Based on the list of Veritas employees and other Hospital employees scheduled for orientation, it was apparent that the Veritas employees attended the same orientation as the employees of the Hospital and worked in the same units performing the same work as those employees. Inasmuch as the Veritas employees were caring for patients in the Hospital, it could reasonably be concluded that they used the same equipment used by the Hospital's employees. The business purposes of the two entities appear to be the same, the care of patients.

Based upon the above, I find that, at the time that Levine sent the two request he had a reasonable belief, based on objective evidence, that an alter-ego or joint employer relationship existed between Veritas and the Respondent. Accordingly, the Union was entitled to such information. The Respondent unlawfully refused his request for such data.

2. The Legal Standards for Refusals to Bargain

The Board applies different standards to allegations of refusals to bargain. Where the allegation is that the respondent unilaterally changed a term or condition of employment the Board considers whether the union has clearly and unmistakably waived its right to bargain over the change. The remedy for a violation is that the employer is ordered to bargain with the union. *Bath Iron Works*, 345 NLRB 499, 501–502 (2005); *Regal Cinemas v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003), enfg. 334 NLRB 304 (2001).

In a contract modification case, involving an alleged violation of Section 8(d) and 8(a)(5) of the Act, discussed in the following section, the General Counsel alleges that a contract provision has been modified. The defense is that the union consented to the change and the remedy for a violation, if found, is to honor the contract.

The Respondent contends that all Section 8(a)(5) allegations, except the alleged refusal to furnish information, should be deferred to the parties' contractual grievance and arbitration procedure. However, it is only in cases where it is alleged that the respondent modified the contract within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act, that the employer may argue that it had a "sound arguable basis" in doing so. In that case, the employer may argue that it had a "sound arguable basis" for its belief that the contract authorized its unilateral action and in interpreting the contract in the manner in which it did. Bath Iron Works, above, at 502. The "sound arguable basis" standard applies only where the issue is whether the employer made a *mid-term* unilateral modification of the collective-bargaining agreement. *The Finley Hospital,* 362 NLRB No. 102, slip op. at 6, fn. 8 (2015).

3. The Alleged Unilateral Changes

The Respondent's actions alleged to be unlawful unilateral changes in violation of Section 8(a)(5) are those in which it allegedly (a) assigned the work of Service Unit employees to non-unit per diem employees (b) failed to continue in effect all the terms and conditions of the contracts by implementing new employee medical plans that were not "substantially comparable" to its former medical plans and (c) failed to furnish the Union with information

concerning Veritas, the independent accountant's reports for 2011 and 2012, and the DNV inspection report for 2013.

In *American Benefit Corp*., 354 NLRB 1039, 1045–49 (2010), the Board stated as follows:

> An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." *NLRB v. Katz,* 369 U.S. 736, 743 (1962); *United Cerebral Palsy of New York City,* 347 NLRB 603, 606 (2006). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz,* supra at 747. "'The vice involved [in a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles,* 315 NLRB 1236, 1237 (1994)(quoting *NLRB v. Dothan Eagle, Inc.,* 434 F.2d 93, 98 (5th Cir. 1970), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

The Board applies the "the clear and unmistakable waiver standard in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of the collective-bargaining agreement." *Provena St. Joseph Medical Center,* 350 NLRB 808, 810 (2007).

Under this rule, waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). Proof of a contractual waiver is an affirmative defense and it is the Respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *Allied Signal Aerospace,* 330 NLRB 1216, 1228 (2000), review denied 253 F.3d 125 (2001); *General Electric,* 296 NLRB 844, 857 (1989), enfd. w/o op. 915 F.2d 738 (D.C. Cir. 1990).

The Board further held in *American Benefit Corp*. that in a unilateral change case a collectively-bargained provision may be deemed to constitute a waiver by the union of the employer's duty to bargain over the conduct, but only if the contract's text, or the parties' practices and bargaining history "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena,* above at 811.[13]

The Respondent asserts that the contract's management rights clause established the Union's waiver of its right to bargain over these changes. However, a generally worded management rights clause, such as this one, will not be construed as a waiver of statutory bargaining rights when it does not specifically make reference to a particular mandatory subject, and where there is also no evidence that the parties discussed permitting the specific unilateral action under the management rights clause. *Hi-Tech Cable Corp.,* 309 NLRB 3, 4 (1992), enfd. w/o op. 25 F3d 1044 (5th Cir. 1994). *Johnson-Bateman Co.,* 295 NLRB 180, 185 (1989) (Board has consistently found that a general management-rights clause does not constitute a clear,

unequivocal, and unmistakable waiver by a union of its right to bargain about implementation of a work rule not specifically mentioned in the clause).

In *Trojan Yacht*, 319 NLRB 741, 742-743 (1995), the Board held that in order to establish a waiver of the statutory right to bargain over mandatory subjects of bargaining there must be a clear and unmistakable relinquishment of that right. *Exxon Research & Engineering Co*., 317 NLRB 675 (1995). To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter.

a. The Alleged Assignment of the Work of Service Unit Employees to Per Diem Employees; The Lay Off of Part-Time Service Employees and Retention of Per Diem Employees

The complaint alleges that since September, 2012, the Respondent has been assigning the work of service unit employees to non-unit per diem employees without giving the Union an opportunity to bargain with the Respondent concerning such conduct. The complaint also alleges that service unit employees have been laid off and per diem employees have replaced them or have been retained to perform their work.

The unit description in the service contract contains a lengthy, specific list of the classification of the "fulltime and regular part time" employees included therein. It does not include "per diem" employees in that list. In contrast, the RN contract includes per diem nurses in its unit recognition clause. Accordingly, it must be concluded that the parties consciously chose to exclude per diem service employees from the service unit. This is reinforced by Section 15.3 of the service contract which states that "a per diem employee is an employee who works on an as-need basis. Per diem employees are not guaranteed work hours nor do they have any rights under this bargaining agreement including the just cause provision."

The service contract provides that non-probationary employees are to be laid off in inverse order of their classification seniority. The contract also provides that full-time employees have seniority within their job classification over the seniority of part-time employees and per diem employees, and that part-time employees have seniority within their job classification and also over the seniority of per diem employees. Per diem employees shall have seniority only within their job classification.

Article 20.6, contained within the management rights clause, states that "the Employer will endeavor to assign available work to bargaining unit employees provided, however, that the Employer reserves the right to subcontract consistent with past practice."

Garrity testified that full-time service department employees were thirty percent "more costly" than per diem employees performing service work because the full time workers received benefits.

She stated that service department managers had the authority to, and did hire per diem employees to compensate for any "shortfall" in hours which resulted from the absence of full-time employees. Garrity stated that she was notified by the department director prior to the time that full-time service employees were being laid off so that she could notify the Union and the workers.

Garrity stated that before the layoffs of service unit employees she did not examine the work schedule of the person laid off to determine whether part-time or per diem employees could have been laid off in lieu of the full-time employee.

The record establishes and the Respondent does not dispute (Brief, pages 66, 67) that Union agent William Boydston properly calculated the hours of work of the service unit employees covered by the service contract and the hours worked by non-unit per diem employees who are not covered by the contract.

According to Boydston's analysis which is confirmed by the evidence, the hours for all service unit employees, except for the hours of the dietetic assistant decreased 25% from 2012 to 2013 in the job classifications dietary aide, environmental services aide, nurse aide and nurse aide II.

In addition, the evidence establishes that the percentage of the overall work performed by non-unit per diem service workers increased, while the percentage of work performed by bargaining unit service workers decreased.

The evidence, which the Respondent does not contest, also establishes that certain full-time and part-time service department employees were laid off while at the same time less senior employees and per diem workers were retained.

For example, full-time dietary aides Ida McGinnis, Martha Serrano and Caesar Medina were laid off on September 8, 2012. They were replaced by per diem dietary aides Ernesto Soriano, Marie Bangura, Marvin McCray, Minaxi Patel, Rodolfo Francisco, Daniella Killat, Arolina Maluto, Jenie Velasquez, Daniel Martinez, and Joseph Schappa.

On November 23, 2012, full-time dietary aides Zeinaida Rodriguez, Zenaida Lee, and Lisa Michael were laid off. Following the layoff of those employees the Respondent utilized the services of part-time workers to perform the work of the laid off employees. Thus, following the layoffs of those workers, per diem dietary aides Soriano, McCray, Killat, Patel and Martinez worked the hours that the laid off employees worked.

Full-time cook Homer Navarro was laid off on September 8, 2012. Following his layoff, per diem cooks Ernesto Soriano and Felix Naranjo, who were less senior than Navarro, worked in his stead.

Further, dietetic assistants including Maria Rivera who was laid off on August 24, 2012, and Victoria Cornejo on Mach 24, 2013, both non-unit per diem employees, performed such work.

In addition, full-time workers in the classification Environmental Services aide were laid off in March, 2012. They were Lidia Mateo, Noralba Montenegro, Catherina Veale, Katie Polite, Delmy Carreras, Bienvenido Berida and Nebis Diaz. One year later, in March, 2013, the Respondent laid off Paula Robertson. Their work was also performed by non-unit per diem workers. Part-time employee Sonia Cruz was retained notwithstanding that she should have been laid off before the full-time workers.

Discussion

It is well established that the assignment of work is a mandatory subject of bargaining. *WCCO-TV*, 362 NLRB No. 101, slip op. at 2 (2015). The Board has held that an employer violates Section 8(a)(5) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-

bargaining representative. *Harris-Teeter Super Markets, Inc.*, 307 NLRB 1075 at fn. 1 (1992), citing *Kohler Co.*, 292 NLRB 716, 720 (1989); *A-1 Fire Protection, Inc.*, 273 NLRB 964, 966 (1984). The assignment of unit work to non-unit employees, the Board has explained, affects the unit employees' terms and conditions of employment, as it has the potential to affect the scope of the bargaining unit. *Antelope Valley Press*, 311 NLRB 459, 460-461 (1993).

The Respondent's assignment of unit work to non-unit employees was a mandatory subject of bargaining which the Respondent was not free, absent a clear an unmistakable waiver by the Union of its right to bargain over the matter, to unilaterally make said work assignment without giving the Union prior notice and an opportunity to bargain. *Pan American Grain Co., Inc.,* 343 NLRB 205, 222–23 (2004).

The Respondent correctly argues that service work may be performed by unit service workers as well as non-unit per diem employees. The Respondent also argues that the contract's management rights clause grants to it the sole and exclusive right to assign work, to transfer out any work, to determine the number of employees, the duties to be performed, and to determine if and when positions will be filled, regardless of whether such actions cause reductions or transfers in the workforce.

In assigning service work to per diem employees, the Respondent correctly argues that the contract does not require it to assign a certain number of hours to service unit employees as opposed to per diem workers.

From these propositions the Respondent argues that it had no duty to bargain regarding the amount of work assigned to per diem employees. It contends that, even assuming that its conduct constituted a "transfer of work outside the bargaining unit" it had no duty to bargain because the management rights clause permits it to do so. It argues that the clause constituted a "clear and unmistakable waiver" of the Union's right to bargain over such a transfer of work outside the unit.

The Respondent also reads Section 20.6, permitting it to subcontract work consistent with past practice as limiting its obligation to "endeavor to assign available work to bargaining unit employees…."

I cannot find that the Union clearly and unmistakably waived its contractual right that service unit employees who have greater rights under the contract be assigned work instead of per diem workers who have no rights under the contract. I cannot find that this specific issue had been discussed between the parties or that the management rights clause specifically addresses that issue. The contract establishes a precise procedure prescribing the seniority of service unit workers and their layoff. In contrast, the per diem employees do not enjoy the benefits of the contract.

Although the contract does not prohibit the Respondent from assigning work to per diem employees, it provides that it will "endeavor to assign available work to bargaining unit employees…." It did not do so. Thus, as set forth above, Garrity was informed, in advance, of the layoff of full-time service workers but did not make any effort to look at the work schedule of the person laid off to determine whether part-time or per diem employees could have been laid off instead of the full-time employee being laid off.

Garrity's admission establishes that the Respondent ignored its obligation to assign work to bargaining unit service department employees instead of to non-bargaining unit per diem workers.

The Respondent further argues that the seniority provisions of the service contract do not apply concerning the alleged layoff of full-time employees and the alleged retention of part-time per diem workers.

According to Section 5.1 of the contract, "seniority is defined as the length of time an employee has been continuously employed in any capacity by the hospital" and "classification seniority is defined as the length of time an employee has worked continuously in a specific job classification within a department."

The General Counsel argues that Section 5.2 of the contract establishes that full-time service unit workers have seniority over part-time and per diem workers. He contends that, based on that provision the Respondent unlawfully laid off the full-time service workers and retained part-time and per diem employees.

Section 5.2 states that "seniority shall accrue within each job classification (i.e. full-time, part-time and per diem). Full-time employees shall have seniority within their job classifications and also over the seniority of part-time employees and per diems. A part-time employee shall have seniority within their job classification and also over the seniority of per diem employees. Per diem employees shall have seniority only within their job classification."

The Respondent argues that that section applies only to the accrual of seniority, not how layoffs are to be conducted. The layoff provisions are set forth in Section 5.4 of the contract which states that "classification seniority shall apply in layoffs and recalls." Article 15 of the contact defines "classification of employees" based on the number of hours the employee is regularly schedule dot work.

The Respondent contends that the contract provides that it may lay off employees by job classification. Section 5.5 of the contract, the layoff provision, provides that "in the event of a layoff within a job classification, probationary employees within that job classification shall be laid off first. Non-probationary employees shall be the next to be laid off in inverse order of their classification seniority."

The Respondent argues that since the contract does not expressly provide for the layoff of per diem workers before full-time and part-time employees, it need not lay them off before the full-time and part-time workers. This argument contradicts the clear language of the contract that per diem employees have no rights under the agreement. No rights under the contract must mean that they have no seniority rights over full-time and part-time workers, and no rights to be retained in preference to the full-time and part-time employees. The only seniority rights of per diem workers are those set forth in section 5.2, above – they have seniority only within their job classification.

In *Torrington Enterprises*, 307 NLRB 809 (1992), the Board held that the employer violated the Act by laying off two bargaining unit employees and replacing them with non-unit employees without giving prior notice to the union and without providing the union with an opportunity to bargain about the decisions and their effects on the unit employees.

I accordingly find and conclude that the Respondent violated the Act, as alleged, by assigning work of the service unit employees to per diem employees, and laying off part-time service employees while retaining per diem employees. The Union did not waive its right to bargain over this subject and the management rights clause did not privilege the Respondent to take this unilateral action.

b. The Alleged Implementation of Medical Plans Which were not Substantially Comparable to the Original Medical Plans

The complaint alleges that since about January 1, 2013, the Respondent failed to continue in effect all the terms and conditions of the three contracts by implementing new employee medical plans which were not "substantially comparable" to its former medical plans.

The three contracts provide as follows:

> Article 24. Insurance. [T]he employer shall provide a Qualcare policy of medical insurance and Medco prescription drug plan for all eligible employees and their eligible dependents. All co-pays, office visit charges, deductibles, out of network fees and prescription drug co-pays shall be the sole responsibility of the employee or his/her dependent.
>
> The Employer has the unilateral right, in its sole discretion to make changes in the insurance program, including changes in benefits, carriers, or third party administrators at any time.
>
> The Employer will maintain benefits at substantially comparable levels with the understanding that "comparable" does not mean "identical."

The issue to be decided is whether, since January, 2013, the Respondent instituted new medical plans whose benefit levels were not substantially comparable to those in place when the contracts were signed in December, 2010.

The original medical plan, in effect as of December, 2010, was administered by Qualcare. The Respondent implemented a new plan, administered by MagnaCare, in June, 2011. It is not claimed that that plan, at the time of implementation, was not substantially comparable to the Qualcare plan.[5]

However, effective January 3, 2013, the Respondent implemented a new MagnaCare plan which the General Counsel alleges provides benefit levels which are not substantially comparable to the original Qualcare plan.

For example, the 2013 MagnaCare network and out of network deductibles were both increased from $500 to $3,000 for individuals, and from $1,500 to $9,000 for families.

In addition, the MagnaCare network co-insurance limit increased from $2,000 for individuals and $3,000 for families to $6,000 for individuals and $9,000 for families. Further, the new 2013 MagnaCare Preferred Provider Organization (PPO) network deductible increased from $500 for individuals and $1,500 for families to $3,000 for individuals and $9,000 for families. The co-insurance limit also increased for individuals from $2,000 to $3,000 for individuals and $6,000 to $9,000 for families.

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[5] In fact, the General Counsel concedes that the 2011-2012 MagnaCare plan was "largely the same" as the original Qualcare plan. Brief, p. 72.

Coverage for in network and out of network care were also reduced in the new MagnaCare network. For example there were increases in costs to employees for care at SurgiCenter, anesthesia, Home Health Care, Skilled Nursing Facility, Hospice Care, Durable Medical Equipment, Laboratory fees, ER costs, and admission for surgery inpatient and outpatient care.

Although not expressly a factor of benefit levels, access to physician-members of the plan is an important part of employees' ability to obtain needed care. It is reasonable to find that the number and type of physicians accessible to plan members constitute a "benefit" to the member. Clearly, if a smaller number of physicians are available under the new plan than were available under the original plan, the member's access to physician services would be reduced and therefore the benefit to the member of having a larger number of physicians with a variety of specialties, would decline. It may be concluded that the reduction in the number of physicians and the specialties of those physicians constitute a reduction in the benefit level of the new plan.

I acknowledge, in this regard, that the Respondent's expert Joseph DiBella, affiliated with employee benefits consultants Connor Strong and Buckelew, testified that the location and number of network providers are not considered in determining benefit levels because providers may be added or eliminated from a plan's network at any time. Nevertheless, the experience of the employees, the users of the Plan, was that the numbers of physicians was reduced. This is true regardless of whether additional providers could have been provided at any time.

In addition, in 2013, the number of hospitals and physicians who were available to users in the MagnaCare Exclusive Provider Organization (EPO) plan were reduced. Under the original plan users could choose from a large number of nationwide physicians. Under the new plan, the physicians available were limited to those practicing in the Employer's facility and a small number of other affiliated physicians. Under that EPO plan, employees could access the larger network of MagnaCare providers for "a service not provided by the Employer or by a Meadowlands physician or if, in an emergency, the patient could not travel to a Meadowlands facility.

Thus, the Respondent notified its employees that, effective January 1, 2013, "if you are enrolled or are enrolling in the EPO plan for the 2013 Plan Year, any services you require will be done by Meadowlands Hospital or one of the Meadowlands Physicians employed by the hospital." A list of 57 physicians practicing 25 specialties was attached.

Further, the 2013 EPO plan provided for an increase in the annual deductible from $500 to $1,500 for individuals and from $2,000 to $6,000 for families.

In addition, in-patient admission for surgery was covered at an 85% rate after the deductible under the original MagnaCare plan, and covered at a 60% rate after the deductible under the 2013 plan.

In 2014, the Respondent again changed its medical benefits to TruPlan which is a Multiple Employer Welfare Arrangement (MEWA). It eliminated (a) the PPO option (b) any coverage for out of network providers and (c) access to the MagnaCare network.

Instead, TruPlan provided for "domestic health benefits" for care at the Hospital and a small number of affiliated physicians. Care from participating providers outside the Hospital's network were only available in cases of emergencies, cardiology and organ transplants. Such "non domestic health benefits" included out of area emergencies provided to employees outside the Hospital's geographic area because a "timely response is not possible," and invasive cardiology and organ transplants which are not available at the Hospital but are provided by the Plan through a Participating Provider Network.

The Respondent's expert, DiBella, estimated that the Respondent's 2012 PPO plan paid 91% of the cost of care while the 2013 PPO paid 80% of that cost, clearly a reduction in the amount of benefits provided to employees.

Further, the original 2011-2012 plan provided for a "special feature" where a participant required care that was unavailable within the QualCare network. In that case, the employee may receive specialized care for certain procedures from out of network providers and receive the network level of benefits. Any physician charges provided must be medically necessary as determined by the Plan.

In contrast, the 2014 TruPlan does not give the Benefit Administrator the right to cover care that is performed by out of network providers. Rather, the plan provides that the Benefit Administrator may, in his discretion, interpret the plan to cover such care.

DiBella, using a computer model, testified that the original, 2011-2012 PPO and EPO plans provided a benefit level, which he termed an "actuarial value," of 91% and 84%, respectively, whereas the 2013 PPO and EPO plans provided benefit levels were both 80%. Further, he stated that the 2014 TruPlan provided a benefit level of 97%.

DiBella concluded, based on the above figures, that the level of benefits has been substantially comparable at all times. On the contrary, however, he conceded that his calculations were not accurate in that they state that TruPlan covered 100% of benefits for ancillary skilled nursing care, hospice/home healthcare, and durable medical equipment when, in fact, none of those benefits are covered. He stated that he had to "go back and get a deeper explanation from my group that manages this… it might not suggest what it otherwise would."

DiBella noted that even if durable medical equipment, skilled nursing care and hospice care were accurately represented as not being covered by TruPlan, there would be no impact on the actuarial value of the Plan. He estimated that if those categories were included in the calculations as having reduced the coverage of TruPlan by 7%, he would conclude that TruPlan covered 90% and not 97% of the cost of care.

The impact on the actuarial figures is one thing. The impact on the user, the employee, is quite another. Thus, according to DiBella, TruPlan did not provide any benefits for such important care as ancillary skilled nursing care, hospice/home healthcare and durable medical equipment. He explained that those categories are among the "most low-utilized benefits one could have… specifically hospice care is limited only those individuals who have six months or less to live."

Discussion

The Respondent's conduct in this regard is alleged as a unilateral change and as a violation of Section 8(d) of the Act. Both will be discussed here.

The Board has held that the "identity of the administrator/processor of the hospital, medical, and surgical benefits program has a vital effect on the wages, hours, and working conditions of the unit employees and is a mandatory subject of bargaining. By changing the administrator/processor of this program … the effects on the terms and conditions of employment of the unit employees attendant to the change in the administrator/processor of the hospital, medical, and surgical benefits program from Blue Cross to Metropolitan were substantial and significant, and that the identity of the administrator/processor of this insurance plan is a mandatory subject of bargaining. Respondent modified the collective-bargaining agreement in midterm, without the agreement of the Union and without complying with the provisions of Section 8(d). In so doing, Respondent failed to bargain in good faith with the

Union, in violation of Section 8(a)(5) and (1) of the Act." *Keystone Steel & Wire*, 237 NLRB 763, 766-777 (1978).

The question that must be decided is whether the benefit levels have been reduced under the new plans introduced beginning on January 1, 2013. Benefits reduced to users in the critical areas of skilled nursing care, hospice/home health care and durable medical equipment have a significant impact on their ability to pay for care for themselves and others covered by the plan.

The Respondent maintains that the use of actuarial valuations of the plans support its position that the new plans provided substantially comparable benefit levels as the original plan.

I do not agree. As set forth above, DiBella's computations were incorrect in that he misstated the benefit levels of the new plan. He conceded that his calculations were not accurate in that they state that TruPlan covered 100% of benefits for ancillary skilled nursing care, hospice/home healthcare, and durable medical equipment when, in fact, none of those benefits are covered.

In addition, as outlined above, certain medical benefit areas which were covered under the old plan were either not covered under the new plan implemented on January 1, 2013 or were covered to a lesser extent than the original plan.

The Respondent's alleged failure to provide substantially comparable benefit levels in the new plan is also alleged as a violation of Section 8(d) of the Act. In that regard, the Respondent argues that it had a "sound arguable basis" for its belief that the new medical plans provided substantially comparable benefit levels to the original plan, citing *Bath Iron Works, Corp.*, 345 NLRB 499, 502 (2005). The Respondent could not have had a sound arguable basis for interpreting the new plans as having substantially comparable benefit levels to those of its original plan.

I accordingly find and conclude, as alleged, that since about January 1, 2013, the Respondent failed to continue in effect all the terms and conditions of the three contracts by unilaterally implementing new employee medical plans which were not "substantially comparable" to its former medical plans without obtaining the Union's consent to that change.

The Union did not waive its right to bargain over this subject and the management rights clause did not privilege the Respondent to take unilateral action concerning this mandatory subject.

D. The Alleged Violations of Section 8(d) of the Act

The Respondent's actions alleged to be unlawful modifications of the contract in violation of Section 8(d) and 8(a)(5) of the Act are those in which it allegedly (a) failed to continue in effect all the terms and conditions of the contracts by (i) refusing to apply the RN contract to nurse interns (ii) implementing new employee medical plans that were not substantially comparable to its former medical plans (iii) eliminating employees' 12-hour shifts as provided in the RN and Tech contracts (iv) refusing to make contributions to employees'' 401(k) plans as provided in all three contracts (v) failing to allow Union representatives to meet with employees in the cafeteria (vi) changing the bumping provisions in the contracts (vii) refusing to apply the Service Contract to hospital assistants and to nursing assistant interns and (b) failing to offer bumping and recall rights to laid off employees.

Where it is alleged that the respondent modified the contract within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act, the Board has held that Section 8(d) of the Act first requires an employer and union to bargain collectively "in good faith with respect to wages, hours, and other terms and conditions of employment" and also requires that where the employer seeks to modify or alter the terms and conditions contained in the agreement the employer must obtain the union's consent before making or implementing any changes. *St. Vincent Hospital*, 320 NLRB 42 (1995). An employer is prohibited from modifying the terms and conditions of employment established by a collective-bargaining agreement without first obtaining the consent of the union. *Hospital San Carlos Borromeo,* 355 NLRB 153, 158 (2010).

In an 8(d) case, where the dispute is solely one of contact interpretation and there is no evidence of animus, bad faith, or intent to undermine the union, the Board does not seek to determine which of two equally plausible contract interpretations is correct. *Bath Iron*, above; *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (2006) (citing *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988)).

Absent the union's consent, a mid-term contract modification of a term governing a mandatory subject of bargaining violates Section 8(a)(5). See *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994), enfd. 46 F.3d 339 (4th Cir. 1995). An employer, however, can justify that conduct by articulating a "sound arguable basis" for believing that the contract allowed such a modification. See *Hospital San Carlos Borromeo*, 355 NLRB No. 26, slip op. at 1 (2010).

The Board assesses whether a party's contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation. The parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks both at the contract language itself and at any relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Kmart Corp.*, 331 NLRB 362, 362 (2000).

Further, where there are "two equally plausible interpretations of the contract," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." *Bath Iron Works,* above.

The Respondent argues that as to these 8(d) allegations of the complaint it had a "sound arguable basis" for taking the action it did, *citing Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949 (2006) and *Bath Iron Works Corp*., 345 NLRB 499, 502 (2005), it maintains that where the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the union, the Board will not seek to determine which of two equally plausible contract interpretations is correct.

The Respondent asserts the "sound arguable basis" defense as to the allegations concerning the alleged (a) implementation of new medical plans (b) refusal to include the RN interns in the RN unit (c) elimination of employees' 12 hour shifts (d) violation of the bumping and recall rights of service unit and technical unit employees (e) refusal to apply the service contract to hospital assistants and nursing assistant interns (f) layoff of fulltime employees and retention of part-time and per diem service employees and (g) refusal to allow union representatives to meet with employees in the cafeteria.

1. The Alleged Selection of Employees for Layoff without Bargaining

The complaint alleges that since February, 2012, the Respondent has been selecting employees to be laid off without affording the Union an opportunity to bargain with it regarding the criteria to be used for selecting employees to be laid off, and without affording the Union an opportunity to bargain over the effects of the layoffs.

a. Seniority in Layoffs

On December 7, 2010, Liberty Healthcare Systems, the prior owner of the facility, permanently laid off its employees who were represented by the Union. On the same day, the Employer purchased the facility and hired all of those employees. The following day, the parties signed the three contracts involved here. Thereafter, in February and March, 2011, the Employer discharged about 30 of the former Liberty workers, including 20 employees represented by the Union.

The Union grieved their termination. The Employer argued at an arbitration proceeding that pursuant to Article 3 of the contracts, inasmuch as they were new employees who began work for the new employer on December 7, 2010, they were probationary employees whose discharges could not be grieved during their 90 day probationary period.

The Union argued that the workers were not probationary employees. Arbitrator Harris decided, in February, 2012, that the employees were probationary workers and upheld their discharges.

The Harris decision, and another, decided by arbitrator Restaino, have been interpreted by the Respondent as holding that the employees of the Hospital were considered new employees when the Respondent purchased the facility on December 7, 2010. Accordingly, the Respondent has determined that their seniority with the Hospital began as if they began work on December 7, 2010.

The Union has argued that their seniority date of those employees employed at the facility on December 7, 2010 must begin with their date they began work when Liberty owned the facility which coincides with when the Union was recognized by Liberty.

In April, 2012, the Union filed a “class action” grievance concerning the layoffs of certain employees. The Employer argued, based on arbitrator Harris’ decision, that the employees it hired on December 7 were new employees with a hire and seniority date beginning on that date.

The Employer maintains that inasmuch as the seniority date of all its employees begins on December 7, 2010, they all had equal seniority. The contract requires that layoffs be conducted in reverse order of seniority but the contract is silent as to the procedure to be used where, as here, employees have equal seniority.

The Union periodically, through its representation by Union agent Leo Torrey and then agent Levine, requested information from the Employer regarding the Hospital’s system for determining how layoffs would be conducted and the criteria used in selecting for layoff one employee over another, both of whom have identical seniority dates.

On April 17, 2012, Dudsak and Torrey attended a meeting with Pavisic and Karsos concerning employees being laid off at that time. Torrey demanded bargaining over what criteria was used to select employees for layoff and who was being selected for layoff.

The two union agents asked for the plan to be used in selecting employees for layoff. According to the Union agents, Pavisic replied that the Union "lost" the Harris arbitration, and that they had to "get over it. You have to move forward. This is the way it is and management can do what they want to do." Pavisic told Torrey that, pursuant to the Harris decision, the Hospital, in its sole discretion, had the right to lay off employees and select employees for layoff as it saw fit.

Karsos stated that at that meeting, Torrey complained that seniority was not used in the layoff process. Karsos replied that all the employees had the same seniority date. Torrey answered that the old, Liberty seniority, should be used. Karsos said that at first, she selected names based on the alphabet, then for the second and third set of layoffs she made the selections randomly. Torrey replied that he did not care how she selected the names. "I am going to grieve it anyway."

On April 18, 2012, the Union demanded "a detailed explanation of the hospital's system for determining how the layoff would be conducted.. .what was the criteria used to select one member versus another." On September 5 and 20, and October 23, 2012, Levine demanded bargaining "over the effects of the planned layoff on our bargaining unit members."

Notwithstanding those requests to bargain, Garrity testified that since she became the human resources director in November, 2012, the parties never negotiated how employees with equal seniority would be selected for layoff. It must be noted that Section 5.4 of the contract which deals with layoffs, states that "at the request of the Union, the Hospital will meet with the Union to discuss any matters the union has concerning the layoff or reduction of hours."

In October, 2012, Levine received layoff notices from Nancy Forsyth, the Respondent's human resources person. In reply, Levine asked for information and demanded bargaining over the impact and effects of the layoffs. He requested information concerning the basis for selecting employees for layoff where the Hospital considers such employees to have identical seniority dates.

Forsyth responded on October 26 that the Hospital "disagrees with your position that negotiations are necessary or appropriate with respect to … layoffs." She asserted that Article 5 of the contract establishes how layoffs are to be conducted and concluded that the "layoff provisions have been "fully bargained" and no further negotiations will be conducted. She quoted the management rights clause which states that the Hospital has the sole and exclusive right to lay off and recall its employees, adding that "the selection of persons for layoff with identical seniority is in the discretion of the Hospital."

Levine responded that the Employer was obligated to bargain over the effects of a layoff on unit employees, particularly where an element of the layoff, equal seniority, was not considered when the contract was negotiated.

Levine stated that during the discussion in the Fall of 2012 when he spoke to management regarding objective standards, the Employer suggested some possibilities and he suggested that the Union would consider that the selections for layoff of employees with equal seniority be done alphabetically, reverse alphabetically, or by birthday. Levine stated that the Employer did not respond to those suggestions, and the Union did not consider these suggestions as proposals. He stated that the Union did not propose these methods because the Employer did not entertain any discussion on the matter. In fact, Levine stated that he did not propose using the original, Liberty date of hire because it was not in the context of the Employer being willing to negotiate the issue.

Nevertheless, Levine stated that he did speak with Karsos or Garrity where they made suggestions and proposals concerning ways to break the tie. However, he did not consider that that discussion constituted actual proposals because they did not have the authority to negotiate and did not state the Employer's position. Rather, they simply asked what proposals the Union would entertain. In return, Levine suggested the use of any objective standard such as alphabetical, reverse alphabetical, day of birth, but that it was the Union's preference that the original date of hire at Liberty be used.

Levine stated that it was possible that when the Union voiced its concern that breaking ties was not being appropriately done by the Employer, that Garrity may have asked what the Union was proposing, and he suggested those methods. However, according to Levine, the Employer never indicated that it would entertain those suggestions in any way and the Union did not receive a response to those suggestions. Nor did the Employer express a willingness to discuss those suggestions.

Levine testified that he, and not Karsos, suggested breaking ties in seniority by the use of a reverse alphabet. Notwithstanding the arbitrators' decisions, the Union has maintained that employees' seniority begins on their hire date at Liberty. Levine said that he told Respondent's attorney Robert Mulligan that it was not the Union's preference but he would negotiate the issue of breaking ties. Mulligan asked for an example and Levine suggested the use of a reverse alphabet.

Respondent's attorney, Alfred Maurice, testified that the Respondent's position was that with respect to those employees with a seniority date of December 7, 2010, the management rights clause of the contract gave the Hospital the right to lay off employees at its discretion. The contract contained a detailed procedure for the conduct of layoffs. Maurice stated that the contract's detailed layoff procedure was fully negotiated by the parties and was followed when the Respondent made layoff decisions. His position was that no negotiations were necessary to conduct the layoff – the parties need only comply with the terms of the contract.

Nevertheless, Maurice noted that the Respondent and the Union met and attempted to resolve the impact of a tie in seniority dates but the Union refused to participate in any negotiation regarding breaking ties in seniority because it insisted that the only date that could be used for a worker's seniority date was the date the employee was hired at Liberty. He stated that, ultimately, the Respondent implemented what it believed was the correct method since the Union provided no "input," no "meaningful discussion" and did not "productively negotiate" on the matter. The Respondent's position was that the Union's failure to "productively negotiate with" the Hospital regarding the breaking of ties in seniority permitted it to implement a layoff at its discretion.

On December 4, 2012, Dudsak attended a grievance meeting with Garrity, Mulligan and Levine concerning layoffs and other issues. She testified that Levine told those present that the parties need a "backup plan" to decide on the seniority, for layoff purposes, of employees with equal seniority. Some plan was needed to break the tie on seniority dates. He suggested such methods as alphabetical, date of birth, date of hire at Liberty - adding that "you have to pick it and use it going forward." Dudsak said that the Employer responded that it is management's right to pick and choose who to lay off. Garrity testified that the selection of which employees to lay off was left to the department managers who made such decisions. The manner in which the managers selected employees for layoff was not reported to her.

Levine stated that the Union's preference was to apply the employee's original seniority date at Liberty Hospital, but it would agree to an objective way of breaking ties in seniority. He stated that the Hospital advised the Union that inasmuch as it was applying the employee's

seniority dates to layoffs, it was its right, pursuant to the management rights clause, to determine how ties in seniority would be broken, and that it would refuse to bargain over that subject. Levine stated that he repeatedly said that the Union wanted to bargain over the subject of selecting employees for layoff, and he offered certain options such as the alphabetical order of an employee's name or her birth month. According to Levine, Mulligan replied that the issue of seniority was decided by arbitrator Harris.

Levine testified that at that meeting the Union was prepared to bargain over how ties in seniority should be broken, suggesting that an objective standard be adopted by the Employer. He stated that he did not tell management that it could choose among objective criteria to be used in selecting for layoff among employees with equal seniority. Rather, he discussed bargaining over such objective criteria. Levine stated that Garrity and Mulligan made "very clear" that they were not authorized to resolve any of the grievances presented. They were present solely to hear the Union's position on each of the issues which they would present to the Hospital's owners and then respond to the Union.

Levine stated that the parties discussed the matter again in November and at the December 4 meeting, but at no time did the Respondent make a proposal or offer to bargain. The Hospital maintained that determining how to break a tie was its prerogative.

The parties had a number of meetings concerned with the discharge and later reinstatement and suspension of employee Cynthia Brizzi. At a meeting in January, 2013 the Employer argued that Brizzi lost her seniority when she was suspended. Attorney Maurice asked the Union which employees it wanted laid off. Levine said that the Union would not choose any. Levine testified that he made many demands to bargain over the standards to be applied to break ties in seniority, but would only bargain if the agreed-upon standard applied to all employees, not just one. The Respondent asked the Union team to take a position on Brizzi and the Union refused, repeating that the standard must apply to the entire unit. The Employer said that it was not interested in discussing that matter.

Maurice testified that he said that if it is assumed that December 7, 2010 was Brizzi's seniority date, what employee would the Union want bumped. The Union replied that it would not choose an employee having equal seniority with another, nor would it offer a formula to make the selection. However, Maurice conceded that the Union wanted to establish a "kind of a practice, like the alphabet or picking out of a hat" to resolve the matter. However, Maurice contradicted this testimony by also stating that, in his presence, Levine did not ask him to consider some kind of objective criteria for breaking ties in seniority. However, Maurice noted that Levine may have sent him an email to that effect.

Maurice further conceded that the parties discussed "objective criteria" to resolve the issue but nothing was proffered. Nevertheless, according to Maurice, when he asked Levine for a proposal or formulas so the Union does not have to elect a specific employee to be bumped, he had "no response."

Levine stated that, other than asking the Union for its position regarding Brizzi, the Employer did not ask the Union how it would select for layoff employees with equal seniority. It always maintained that it was a management prerogative and the Union had no voice in how such ties would be broken. Levine said that on one occasion, the Employer expressed a willingness to talk about criteria for layoffs. At that time, Maurice said the parties needed to decide who Brizzi would bump and asked how the Employer could accomplish this.

Levine testified that he told Maurice that the Union wanted to bargain over how the issue of seniority would apply to the entire unit, not just Brizzi. Maurice wanted to discuss Brizzi, only. However, Levine stated that the "only time the Union would discuss and come to an agreement is if we did it for the entire unit, and not on a case by case basis. He was asked for a proposal. Levine answered that all employees must be treated equally – that the standard must be an objective one – that the date should be the date of the employee's original hire at Liberty, but the Union would consider any objective standard. However, Levine testified that the Union did not insist that it would only consider the Liberty seniority date and no other standard.

Again, in a meeting in January, 2014 with Dudsak, Mulligan, Garrity and Levine, Maurice said "you lost the Harris decision, get over it, move on. Can't you move on from here? We're not going through this again. We're done. It's over. You lost, your loss, accept it." Levine asked for a system to break ties in seniority, saying "we need to negotiate over it, either alphabetically, day of birth, a "measurable thing and use it going forward." Dudsak stated that the Employer did not agree to bargain with the Union over what the tie-breaking mechanism should be.

Garrity testified that she spoke to Levine regarding the issue of layoffs of employees with equal seniority dates. They discussed different methods of choosing such employees for layoff. She asked Levine for suggestions –"what would the Union prefer?" Levine responded that it was up to management to decide, but he wanted whatever method selected to be an objective one. He gave some examples the Employer might use, such as alphabetically by last name, day of birth, adding that performance should not be a criterion.

Discussion

"Section 8(a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining.... But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees…. Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee." *First Nat. Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 677 (1981).* Thus, the issue of layoffs and recalls are a mandatory subject of bargaining.

The Respondent argues that it had no obligation to bargain over the criteria for selecting employees for layoff or the effects of the layoffs because (a) the Union clearly and unmistakably waived its right to bargain over layoffs and even if the Respondent had such an obligation it (b) fulfilled its obligation to do so and the Union waived its right to bargain over the subject when it refused to do so.

The Union at first argued that the employees' seniority should date from the time they were hired by Liberty prior to the time the facility was purchased by the Respondent. The Employer maintained, supported by the arbitrators' decisions, that employees' seniority must date from the time it took over the facility, and that the seniority of all employees dated from December 7, 2010.

The Union modified its position to the point where it was willing to discuss how the seniority provisions of the contract relating to layoff and recall should apply to employees having equal seniority. The evidence establishes that the Union demanded that seniority determinations be made on an objective bases applicable to everyone, not just a particular laid off employee.

The Union asked the Respondent to establish an objective system and bargain about the method to be employed in making selections for layoff among employees having equal seniority.

I credit Levine's testimony that the parties engaged in no meaningful, productive bargaining about the subject despite the Union's numerous requests that it do so. This, notwithstanding the contract's provision that "at the request of the Union, the Hospital will meet with the Union to discuss any matters the union has concerning the layoff or reduction of hours."

Levine's testimony is supported by the Respondent's witnesses who stated that negotiations were not necessary because the contract set forth how layoffs are to be conducted - the layoff provisions have been "fully bargained" and no further negotiations will be conducted. The Respondent's witnesses also cited the management rights clause which states that the Hospital has the sole and exclusive right to layoff and recall its employees, and told Levine that "the selection of persons for layoff with identical seniority is in the discretion of the Hospital."

It is thus quite clear that the Respondent refused to bargain with the Union over the criteria to select employees having identical seniority for layoff. It did not consider it necessary in view of the layoff and management rights clauses of the contract.

Notwithstanding that some tentative discussions were had concerning the method of choosing those employees, no meaningful bargaining occurred because the Respondent did not believe that it was required to do so. Bargaining over layoffs and the selection of employees for layoff is a mandatory subject of bargaining.

The Respondent cites *Ingham Regional Medical Center*, 342 NLRB 1259 (2004) and *Omaha World-Herald*, 357 NLRB 1870 (2011) for the propositions that the Union waived its right to bargain about layoffs.

The Respondent's strong reliance on *Ingham* is misplaced. Here, the issue is whether the Respondent selected employees for lay off without affording the Union an opportunity to bargain with it regarding the criteria to be used for selecting them, and without affording the Union an opportunity to bargain over the effects of the layoffs.

In *Ingham*, the Board found held that the Respondent had the contractual right to subcontract certain work. Here, the Respondent also has the contractual right to lay off employees. However, although the Respondent has that right it is only a right to lay off employees pursuant to their seniority. Accordingly, unlike in *Ingham*, the Respondent's right to lay off is limited to its exercising that right by applying the employee's seniority in determining who is to be laid off.

Here, the employees who the Respondent selected for lay off had equal seniority, a factor not addressed in the contract or obviously contemplated by the parties when the contracts were signed. It was not until the arbitrator ruled that all employees had the same seniority date did this issue arise.

In *Ingham*, the Board found a clear and unmistakable waiver by the union in those cases because of the language of the management rights clause, and that the employer was required to simply "discuss" and not "bargain" about the subjects at issue.

The contract in *Ingham* stated that the employer agreed to discuss the decision concerning subcontracting and then had an "interpretive statement" explaining the subjects of the discussion. The Board, in finding no violation in the employer's refusal to bargain, noted the

distinction between the words "discuss" and "bargain" in the contract and found that the employer only had an obligation to discuss the matter and not bargain about it.

The Respondent is correct that here, the contracts do not state that the Respondent will bargain with the Union about layoffs, but only state that the Respondent "will meet with the Union to discuss any matters the union has concerning the layoff or reduction of hours." There is no interpretive statement in these contracts which specify the subjects of the discussion.

I cannot find that that contractual language, even taken together with the clause which gives the Respondent the authority to lay off employees, constitutes a "clear and unmistakable" waiver of the Union's right to bargain about the selection of employees for layoff and the effects of those layoffs. Applying the *Metropolitan Edison* standard, it is clear that the language of the management rights clause neither authorizes the actions the Respondent took or waived the Unions' interest in bargaining over these matters. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

The Board has long held that granting an employer the right to act unilaterally with respect to employment terms that are subject to bargaining under the Act "is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact." *Provena St. Joseph Medical Center*, 350 NLRB 808, 813 (2007).

Accordingly, the Board has required "clear and unmistakable" evidence of waiver and has construed waivers narrowly. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The "clear and unmistakable" waiver standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena*, above at 813.

Here, there is no evidence that the language of the management rights clause or the requirement that the Respondent "discuss" aspects of the layoff was "fully discussed and consciously explored" or that "the union consciously yielded or clearly and unmistakably waived its interest in the matter" or its right to bargain. *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998). there is no evidence that the Union, by agreeing to the language in the contracts referred to above, explicitly waived its right to bargain

I further cannot find that the management rights clause or the clause requiring the Respondent to "discuss" matters relating to the layoff acted to permit the Respondent to act unilaterally with respect to the unique circumstance presented here.

Thus, at the time the contracts were executed, no arbitration rulings had been rendered deciding that employees of the Respondent had equal seniority dates. Those rulings and the dilemma which arose from those rulings, how to select for layoff employees with equal seniority, presented the parties with an ideal opportunity to resolve, through bargaining, how the selections should be made.

Instead, the Res[pendent chose to rely on the management rights clause and the "discuss" versus "bargain" language in the contracts to refuse to bargain about this eminently well suited topic for bargaining. Parties acting in good faith should have been able to negotiate and come to agreement concerning this newly presented issue.

The Respondent further argues that if the Respondent was required to bargain, it did so, and the Union refused to bargain with it, thereby creating impasse on the subject. I cannot find that good faith bargaining took place over the subject of the selection of employees for layoff or the effects of the layoff.

First, as set forth above, the Union several times orally and in writing demanded bargaining over the subject of the selection of employees for layoff. I cannot credit Respondent attorney Maurice's testimony that the Union refused to discuss the topic. As set forth above, Maurice testified that at a meeting at which Brizzi's reinstatement was discussed, the Union wanted to establish a "kind of a practice, like the alphabet or picking out of a hat" to resolve the matter. He then contradicted that testimony by also stating that, in his presence, Levine did not ask him to consider some kind of objective criteria for breaking ties in seniority. However, Maurice noted that Levine may have sent him an email to that effect.

In addition, as set forth above, Garrity testified that she spoke to Levine regarding the issue of layoffs of employees with equal seniority dates. They discussed different methods of choosing such employees for layoff. She asked Levine for suggestions–what would the Union prefer." Levine responded that it was up to management to decide, but wanted whatever method selected to be an objective one. He gave some examples the Employer might use, such as alphabetically by last name, day of birth, adding that performance should not be a criterion.

Accordingly, I cannot credit Maurice's testimony that the Union refused to discuss the matter. As credibly testified by Levine and Dudsak the Union sought to negotiate the issue but the Respondent refused. This finding is also supported by Forsyth's letter, discussed above, which stated that the "layoff provisions have been "fully bargained and no further negotiations will be conducted." She quoted the management rights clause which states that the Hospital has the sole and exclusive right to layoff and recall its employees, adding that "the selection of persons for layoff with identical seniority is in the discretion of the Hospital."

In *Tesoro Refining and Marketing*, 360 NLRB No. 46, fns. 10, 11 (2014), the Board held that the respondent violated Section 8(a)(5) of the Act by unilaterally implementing a broad range of changes to employee benefits.

The Board stated that the respondent repeatedly told the union that it did not have to bargain concerning changes in benefits, that it had the right to make those changes unilaterally, and that the changes would be implemented on a date certain. In other words, the Respondent presented the changes to the Union as a fait accompli, citing See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (finding fait accompli where "the employer has no intention of changing its mind"), enfd. 722 F.2d 1120 (3d Cir. 1983).

In *Tesoro*, the Board further rejected the employer's argument that it had a sound arguable basis for contending that its contract permitted its changes because the respondent's presentation of a fait accompli cannot serve as even a remotely arguable interpretation of its contractual obligation under the contract to discuss/bargain over such a modification. Presenting a fait accompli is the antithesis of *any* definition of discussion or bargaining.

The same reasoning applies here. The Respondent cannot have had a sound arguable basis in deciding on its own to select employees for layoff. The selection of employees for layoff is a mandatory subject of bargaining as it affects their terms and conditions of employment. The Respondent presented a fait accompli, refusing to bargain with the Union over that subject.

I accordingly find and conclude, as alleged, that the Respondent has refused to bargain with the Union by modifying the contract without the Union's consent by selecting employees to

be laid off without affording the Union an opportunity to bargain with it regarding the criteria to be used for selecting employees to be laid off, and without affording the Union an opportunity to bargain over the effects of the layoffs.

E. The RN Internship Program

The complaint alleges that the Respondent failed to continue in effect all the terms and conditions of the RN contract by refusing to apply the RN contract to nurse interns.

Essentially, the General Counsel argues that the RN interns should have been included in the unit of RNs because they received the same general orientation program as newly hired staff RNs and essentially performed the same duties as the staff RNs.

The General Counsel contends that by excluding the interns from the registered nurses' unit the Respondent received the benefit of the interns work as regular staff RNs while paying them nothing or minimum wage instead of the contractual RN wage rate.

The Respondent argues that the interns are not properly a part of the RN bargaining unit because they were enrolled in a training program, they were not promised employment after their orientation period ended, and were not statutory employees.

Felicia Karsos, the Respondent's chief nursing officer, testified that in January, 2011 she sought to hire experienced RNs to work as per diem nurses who would be able to immediately assume full responsibility for nursing care. Advertisements were placed but those responding were new nursing school graduates or individuals having no experience.

Nevertheless, in January and February, 2011, Karsos interviewed the nurses who applied, hoping to find nurses with some experience in their nursing school training which would warrant consideration for a staff nurse's position. As a result of those interviews she recommended to the Hospital's board in mid to late 2011 that a nursing internship program be started. She stated that her recommendation included that the purpose of the program was to provide nurses with the experience needed to enable them to be successful in the job market.

The purpose of the program was to train or provide experience to nurses having no nursing experience. Arthur Kharonov, an RN who is the director of the emergency department and 3 West, stated that the program was established for educational purposes in the Hospital which is a teaching facility. The object of the program was to provide nurses with experience they would need in order to be successful in the job market, and to strengthen new graduate nurses' skills and help them "become and mold themselves" into nurses in the workforce. Karsos told Hospital owners Dr. Lipsky and Dunaev that "there is a void in the profession" – inexperienced nurses are seeking experience, and that having such a program would be helpful in obtaining positive feedback for the Hospital.

Joanne Dudsak, the Union's vice president of the nursing bargaining unit and the local Union's president, testified that in early March, 2011, Karsos announced at a labor management meeting that the Employer was beginning a new program in which it would bring in nurses with no experience, that "they would just be there to observe: to be exposed to the workings of the hospital, the daily operations of a hospital because they were either new graduates or had never worked in a hospital before." Karsos added that the first interns would work in the surgical services since there was an increase in the census in that department.

The internship program is not affiliated with any school. The Employer is not accredited as a nursing school and receives no tuition or payment from the interns. Karsos stated that the interns were not students. No nursing school provided any materials for use during the internship program, nor did any nursing school award credit to those participating in the program.

At the time the program began, there were no vacancies for nurses. Karsos stated that, before the internship program began, if she needed to fill a staff nurse position, she would have hired a new nursing school graduate and trained her in the position, but she conceded that she could have hired the interns into a full-time position and trained them.

Karsos said that she worked with human resources manager Gloria Kunish, beginning the program as a "trial" in the OR. Kunish advertised the program and 10 nurses applied. Karsos and Kunish interviewed them. All the intern candidates had graduated from an accredited nursing school and were licensed by New Jersey as registered nurses. As such, they were privileged to perform work "to the scope of their practice" as registered nurses, and if they violated the standards of nursing practice which required reporting they would have to be reported to the State Board of Nursing.

Director of Nursing Donna Ortiz also interviewed RN intern applicants. She stated that she told them that this was an "experience" for them and that she could not guarantee that they would be offered a job upon the completion of the program. She also told them that she did not know what vacant positions would be available at the completion of their internship. She denied being told by the interns that they wanted to be hired following their internship.

Karsos stated that the Employer did not create a separate job description for the title of intern. If interns signed a job description form it was the staff nurse job description. The evaluation and competency forms were the same for interns and staff nurses. Similarly, the same form used for a position reacquisition was used to input the interns into the system. The Hospital identification badge did not identify the individual as an "intern."

Kharonov interviewed 8 to10 candidates for the program, telling them that their positions were unpaid. However, they were paid the minimum wage of $7.50 per hour. Karsos testified that she believed that the interns had to be paid so that they would be covered by the Hospital's malpractice insurance policy. One intern was told that the sum of money they were paid was for gasoline and other expenses.

Later, Karsos was told not to pay them at all – that they were providing care and, as such, were automatically covered by the Hospital's insurance policy. She further stated that when the Hospital stopped paying the interns, as she stated in her pre-trial affidavit, "according to human resources director Mario Pavisic, the hospital stopped paying the interns because the Union was complaining that paid interns should be included in the RN bargaining unit."

However, at hearing, Karsos testified that Pavisic did not tell her that the Hospital stopped paying the interns because the Union was complaining that paid interns should be included in the RN bargaining unit. She conceded that "there was talk about that" but she did not know if that was exactly what she was told. She stated simply that Pavisic told her to stop paying the interns. In any event, after a period of time when the interns were unpaid, they were then paid the minimum wage of $7.50 per hour.

Paula Ruffin, an official with the U.S. Department of Labor testified that her agency conducted an investigation into the alleged nonpayment of nurse interns. A settlement was

reached based on an audit of payments to the employees in which about $90,000 was paid to the interns. That sum represented the difference in the amounts paid to them and the minimum wage.

Karsos stated that a new nursing graduate would be less costly to the Hospital if she was hired for a full-time position than a more experienced nurse. However, the new nurse may require a longer orientation period which is costly in itself. Because the preceptors were involved with teaching the interns, the Hospital had to hire per diem nurses to cover the patient loads not covered by the staff nurses.

Karsos told the applicants that the program was three to four weeks in duration, would build their skills, and was a "good way to start."

Karsos stated that she sought to hire interns who had a friendly attitude, who would complete the program, and who wanted to stay in the Hospital. She asked them to describe their interests and experience, and told them the internship was a six month training program. She advised them that there was no promise of employment at the conclusion of the program, and she could not guarantee that they would have a job at the Employer or in another hospital. She stated that it was not the Hospital's intent to hire some interns as per diem employees, and she did not assume that the first three interns would be hired as staff nurses after the internship ended. The applicants told Karsos what kinds of experience they wanted – whether it was in med-surg, ICU, pediatrics, or other areas.

Elizabeth Dombrowski testified that she was told by Karsos that she could not promise that she would receive full-time employment following the program, but that it would probably be at least per diem work.

Karsos stated that she told the interns that they would begin on the med-surg unit where they would learn basic nursing skills and develop critical thinking, analytical and organizational skills, perform medication administration, and would then rotate through the ICU and the Rehab unit. Karsos told them that their training would be applicable to wherever they worked. Three interns began their internship in the OR, and about five interns began their internship in Obstetrics.

The first internship program began in May, 2011, and the next, that September. After the intern was accepted into the program, she completed an employee health check and background checks, was cleared by the Human Resources department, and scheduled to attend the next general hospital-wide one-day orientation which was held monthly.

Then the interns had classroom work with a nurse educator for three or four days which included computer training, practice writing patient notes, and then had clinical training in blood transfusions, checking vital signs, medication administration, applying restraints and using medical equipment. They were scheduled to be enrolled in classes for various certifications in life-support methods.

Following the classwork, the interns worked on the nursing floor. The nurse manager and nurse educator worked together with each intern being assigned a preceptor who is assigned based on her willingness to teach. Kharonov stated that the interns were assigned to the most experienced nurse. Each preceptor is given a patient assignment and the preceptor trained the intern on various patient care practices.

Karsos stated that she spoke to the managers and educators overseeing the units where the interns worked. She told them the nature of the internship program – the assignment of patients to a preceptor who was willing to participate; the manager and educator were to have "constant contact" with the preceptor and receive feedback from them as to how the interns were progressing. She stated that the goal was "not to keep them as interns forever." She predicted that, depending on their progress, they would work as interns for eight weeks to five months.

Karsos stated that oversight of the internship program was done by the department manager and the nurse educator. Preceptors were the staff nurses but Karsos acted as a preceptor also. The preceptors did not receive any special training or training materials for the program. However, they had, before this program began, oriented newly hired or transferred nurses. In this regard, Ortiz testified that the ICU RN intern preceptors had no materials as to how to precept and none received special training to perform that function.

The intern "shadowed" her preceptor, watching nursing care given by the preceptor, with the intern caring for first one, then two patients, until she could handle a full load of patients, usually six. Karsos stated that the preceptor permitted the intern to practice inserting a catheter.

Karsos told the preceptors that they were responsible to oversee and monitor the interns; guide them in patient care; explain how to handle certain situations; oversee their documentation; write a proper note and do everything necessary to care for the patient. For example, the intern would watch the preceptor perform a procedure, and then the preceptor would watch the intern perform at least three successful IV sticks and then the intern may begin an IV line without having the preceptor "right over her shoulder."

Karsos testified that the length of the internship period varied with the individual intern. Each intern develops at a different rate, each developing her own skills, competence and confidence at her own pace. The department manager, the preceptor and the nurse educator together determine when the internship period has ended for a particular intern.

Karsos agreed that the interns provided patient care but the Employer did not consider them as employees because during their training the preceptor evaluated them as they executed their skills, and they were not subject to a probationary period which began only when they were hired as staff nurses. Karsos noted that the internship period during which they would be observed was longer than the standard 90 day probationary period for new hires.

When the preceptor determined that the intern was "comfortable" with her experience there, she would rotate to the next medical department which used interns. Karsos stated that one goal of the internship program was that the intern should feel comfortable with her own skills.

This evidence generally was consistent with the interns' testimony that, as they progressed in their internship they were given more and more tasks, and permitted to work more independently.

Karsos precepted the first three interns with another nurse. Each of the two interns took two patients as Karsos did the patients' assessments. If the interns completed the patients' documentations she reviewed their work before those assessments were "signed off."

Karsos stated that after performing medical clearance on the patients, by the fifth day of their internship the goal was to have them provide "complete care" for the six patients they were assigned. The six patients were divided between three interns – two patients each.

Donna Ortiz, an RN and associate director of perioperative services which encompasses the OR, Post Anesthesia Care Unit (PACU) or Recovery Room, endoscopy, same day surgery, and central supply, testified that interns are always with an RN in the ICU. They do not perform any task on their own. She told the preceptors and the interns that the intern is not to do anything on her own. "You are here to observe" with the RN preceptor. She stated that she assigned the intern to a specific preceptor. She advises the preceptor to teach the intern and explain what she is doing and answer her questions. The intern watches the RN administer medications, suction the patient, change dressings and assist the physician.

Ortiz' general statement that the interns did not perform patient care on their own must be viewed in light of Ortiz' limited observation of the interns. She stated that she did not act as a preceptor for any RN intern, noting that when the internship program began, she had just left her position as the manager of telemetry and the med-surg floor and had been appointed as the director of perioperative services. She spent up to 40% of her time in her office when the internship program began and spent 10 to 20% of her day on the three units where she observed operations but did not "look over the staffs' shoulders."

Ortiz conceded that until Spring, 2013 she did not have any conversations with RN intern preceptors regarding their duties, but when she assumed responsibility for the ICU she had such interactions with the preceptors. However, she saw RN interns working on 3 west with their preceptors, adding that the interns were not supposed to work without a preceptor in that unit. However, she noted that she did not, on a regular basis, check or determine what the preceptor and the intern were doing.

Karsos stated that she noticed that an intern had two patients but the preceptor was responsible for four other patients. Karsos told the preceptor that she had to be "dedicated" to the intern, and that her management of four other patients at the same time she was precepting the intern was not "adequate supervision" of the intern. That practice stopped, the change being that the manager cared for the two patients the intern was caring for and the preceptor was responsible for the four other patients.

Ortiz' further testimony that the RN and not the intern charts the patients in the ICU was undermined by the parties' general stipulation that the interns routinely performed charting of their patients as part of their responsibilities, and their further stipulation that the interns' names appear on the charts at times both prior to and after the staff nurses were required to cosign the charts the interns wrote.

Deborah Deering, an RN preceptor for 25 years who received training in precepting years ago, described that function as someone who guides new nurses, instructs them, and watches their work. Deering described her precepting of the nurse interns. They received one day of orientation in the unit where they were shown the locations of various items, instructed in the use of the computer. The intern shadowed her or another nurse preceptor for one day with her patients, watching her as the intern administered patient care.

Deering stated that after their classroom training, two interns were precepted by two preceptors on her unit. She had the same intern for the entire 10 to 12 week period of the internship program. The first day the intern is shown the unit and does a "scavenger hunt" to find items on the nursing floor.

Deering pairs with another preceptor nurse. On the first day, Deering will assesses her three patients while the intern watches. The other nurse works with the other intern and together

they go over the medications needed for her three patients. On the second day, the two staff nurses switch their tasks, with Deering doing the medications with the second intern, and the other staff nurse assessing her patients with the other intern.

Assessments of patients include taking the patient's history, recording the medications taken, and examining the patient. The medication routine includes showing the intern what medications were ordered for the patient, obtaining the medications needed for each patient from the computerized medication cart, and administering them to the patients.

Deering also showed the intern how to make entries in the patient's computerized chart. That task includes writing notes on the patient's condition, the care given, and observations made. Deering and the intern do the admission assessment together – Deering watches while the intern does the actual assessment which includes listening to the patient's heart, etc. They then go to the nurses' station and Deering watches while the intern makes entries in the patient's chart. Deering co-signs the chart as her preceptor.

Also, Deering and the intern receive a report concerning the status of the patient from the outgoing nurse at the start of the shift and they give a report to the incoming nurse at the end of their shift.

Deering stated that the intern's patient load increases from 3 to 4, and then from 4-5, with a maximum goal of 6 patients if they are able to competently care for that number of patients. They administer medications, exhibit critical thinking skills and speak to physicians. Deering stated that the intern does not receive an assignment of patients to care for on her own.

Deering stated that the interns do not work on their own. The intern's assignment is their assignment. If they administer medications, the preceptor must be present to ensure that the medications are correctly given because, in fact, the patients are her (the preceptor's) patients. During those times, the preceptor watches to see that the intern checks the patient's identification on her wrist band, confirms her date of birth, and that she addresses the patient correctly.

Deering noted that after the interns passed their medication tests and she has watched them many times when they administer medications, she may not be present with the intern as she gives the patient his medication. Instead, the intern shows Deering the medication she will give the patient and Deering waits outside the door and listens to the intern's interaction with the patient. However, sometime thereafter, when Deering believes that the intern is fully competent in medication administration, the intern will obtain the medication from the Pyxis system alone without showing Deering what medications she gives the patient.

The Pyxis system is a computerized cabinet holding all patient medications including narcotics. The nurse enters her identification number and scans her finger. A computer screen enables her to select her patient and his medications. The nurse selects the medications needed and the medication drawer opens, accessing the medication. The intern has access to the Pyxis system after they pass their medication test. The preceptor shows the intern how to use the system. After the preceptor is confident that she knows how to use the system she can access it alone.

Deering testified that the intern also performs wound care, dressing changes, ambulation of patients with the physical therapist, and inserts catheters and feeding tubes. However, she does not perform these tasks on her own. The preceptor and intern do them together on the first day of such patient care. On the second day they repeat the tasks together. On the third day,

the preceptor will not guide her. Rather, she stands behind the intern and ensures that the intern is doing the tasks correctly, and that she is comfortable performing it.

Deering noted that, at some point, she stops entering the patient's room with the intern to do such things as feeding, as long as she (Deering) is confident that the intern can handle the task. Similarly, at that point the intern is permitted to chart on her own but Deering sees the chart after the intern makes her entries and co-signs it even though she did not see the charted patient care performed by the intern. However, Deering saw the patient after the care was given.

Deering stated that the degree to which she closely supervises the intern depends on her observation of the intern's skill development. She noted that, naturally, interns develop at different rates. If the intern performs her duties "pretty well" Deering does not necessarily stay with her in the patient's room or immediately outside the room, and there are times when she is not in the patient's room or directly outside the room when an intern is providing care. However, she noted that there is never a point when she is not supervising an intern at all. She is always on the unit when the intern is providing patient care. When Deering is on break or having lunch, the intern accompanies her.

Deering recounted a conversation with Kharonov in which she told him that a specific intern was caring for six patients and was "ready." Deering asked him whether there was a "spot" for the intern or will she work per diem or part-time. Kharonov responded that he would see whether positions were available. Kharonov told her that if he had full-time, part-time or per diem positions available he would try and fill them.

Deering stated that all interns who completed the program either received positions at the Hospital or left for another position elsewhere. None was denied a per diem position at the Employer after completing the internship program.

Karsos testified that she noticed that Deering had patients assigned to her in addition to those that the interns were caring for. She observed that Deering had six patients but the intern was managing two or three additional patients. Karsos told Deering that when the preceptors are assigned they must focus their attention on the intern, and that if the preceptor is caring for other patients she could not give the needed attention to the intern.

She noted, however, that if the preceptor had six patients and two interns each having three patients, that was an acceptable patient load for each because the preceptor could handle two interns and adequately supervise them.

During the intern's training, Kharonov, Karsos and the educator asked Deering how the intern is progressing and how many patients she can take. Based on that determination, which includes a skills checklist and evaluation, a decision is made as to whether the intern receives more patients.

1. The Interns' Work

The RN interns who participated in the nurse internship program testified about their duties.

Elizabeth Dombrowski's testimony was similar to other interns concerning her experience in the internship. On her first day, Dombrowski followed the preceptor, reviewing all their patients' charts. She then took a specific load of patients which she considered her

patients, and with whom she concentrated with her preceptor. Thereafter, the number of patients she was assigned increased, eventually reaching eight, a full load. She had a checklist of tasks which was signed off by her and her preceptor, meaning that she was competent in those tasks.

Dombrowski performed patient care nursing work on her own without a preceptor present or watching her. Such duties included cleaning and bathing patients and administering injections and medications. However, she noted that her preceptor was always present when she performed a task for the first time. Following her first experience, if her preceptor believed that she was competent in that area, she permitted Dombrowski to perform the task on her own.

Dombrowski also performed charting which includes the entire assessment of the patient – everything the nurse observes, writing a short narrative of the patient's condition and the care she provided. It was stipulated that the interns routinely performed charting of their patients as part of their responsibilities. It was further stipulated that the interns' names appear on the charts at times both prior to and after staff nurses were required to co-sign the charts that the interns wrote.

Following the completion of the internship program, Dombrowski was hired as a full-time nurse in the ICU in the night shift, adding that she had to be trained in the ICU. Her pay was scheduled to change to that of a full-time nurse.

Lisa Qian had two years' nursing experience when she responded to an advertisement placed by the Hospital. Kharonov interviewed her and said that the salary was $45 per hour, but did not mention the internship program. A few days later, in late November, 2012, she met with Kharonov and many other nurses. He said that there is an internship program, noting that the least amount of time they could spend in the program is two weeks. He told her and the other interns to follow his plan, and that the "possibility is very, very high" that they would receive a permanent job, but at a minimum, they would be offered a per diem position.

In December, Kharonov told Qian that she could work the evening shift but she declined. She then applied for the internship program because she was told that the possibility was "very high" that she would be hired since she had experience as a nurse.

In January, 2013, Qian attended a two day orientation, and then had classroom sessions with RN Diane Russo. She then worked in the med-surg department during which time she was always assigned a preceptor. However, she later testified that she was with a preceptor on only one day in that department.

Qian performed typical nursing tasks in the med-surg unit such as examining patients, reading the nurses' reports from prior shifts, checking on, preparing and dispensing medications, writing hourly reports on patients, and giving reports to the incoming shift. She was not told that there were some tasks that she could not perform because she was an intern.

The number of patients Qian cared for was gradually increased. Ultimately, she was able to care for six patients with whom she worked alone. She stated that she often worked alone without the preceptor being present. She explained that when she performed nursing tasks alone for the first time, the preceptor was not always present, noting that she always administered medications to patients on her own with no one present. Occasionally, at least once per day, she was unable to find a nurse when she had a question.

Qian first testified that she worked only six days in the ICU, then she stated that she worked there for about one month, noting that she was always assigned a preceptor when she worked in the ICU. She was given specific patients to care for. She did electronic charting in her

own name. She did not know if the preceptor watched her and did not recall such close observation. She further stated that when she needed help or had a question she was unable to find a preceptor half the time she sought one.

In April, 2013, while Qian was still in the internship program, she told Kharonov that she believed that she was a capable nurse and wanted to be paid. She was told to see Karsos. At their meeting, Karsos told her that many people had complained about her and that no one understood her English. Karsos told her that there were many interns entering the hospital, and that there was no room for her, and asked her to leave.

Madeline Gordon was interviewed by Karsos for the internship program. Karsos told her that the pay was at minimum wage with a training period of a few months during which she would rotate through various floors receiving experience in the care of patients on each floor. Karsos also told her that when she completed the program she would "see which floor they would need me on and I would be … you know, have a permanent position on a floor where they needed me." Gordon stated that she would not have accepted a minimum wage position without the understanding that she would be offered a permanent job.

After the one-day general hospital orientation, she received 1½ weeks of classroom training and then worked on the med-surg floor with a preceptor. She worked for about two weeks on that floor in 12 hour shifts, three shifts per week.

Generally, at the start of a rotation, Gordon was closely precepted but as she became familiar with the task involved, and she and the preceptor were comfortable with her performance in a particular area, the preceptor permitted her to work more independently and perform tasks on her own.

Gordon's preceptor, Deborah Deering, was with her the entire time and watched her closely during the first one or two shifts. She also noted that for the first week, Deering was "very present" but that when she (Gordon) felt comfortable on her own and Deering was satisfied with her performance, the following week she was given more patients and performed nursing tasks on her own.

At the start of her tour on med-surg, Gordon was given one patient to care for during which she was watched while she administered medications. The process was that Deering showed her the nursing task to be performed and then watched her do it. Once Deering was satisfied that she was competent in that skill, she was permitted to perform it on her own. The number of patients Gordon was assigned was gradually increased to four, based on her ability.

Gordon worked in the Rehabilitation unit for two weeks, during which time a preceptor was assigned to her for her entire stay there. In the Rehabilitation unit, how closely she was precepted depended on how quickly she learned how to perform the task involved. She stated that she administered medications through feeding tubes, administered and counted narcotics, changed dressings, and did assessments and charting on her own and without a preceptor present.

Gordon was not told that there were any limitations on any tasks that she could perform because she was an intern. She did not see staff nurses perform tasks that she did not perform.

Gordon worked in the ICU for about four days during which she had a preceptor who was not always present while she was performing nursing tasks, but not too far away either. On her own, Gordon hung intravenous bags and administered medications.

Gordon worked in the pulmonary unit, receiving a ten minute instruction from her preceptor concerning the operation of the ventilators. She was assigned to a preceptor during her two week tour there. At first the preceptor was "very present," watching her perform tasks such as suctioning a patient. Once the preceptor saw that Gordon was competent in that area, she permitted her to perform that task. The preceptor did not double check her administration of medications.

Gordon stated that the preceptors were "more nervous" about her giving medication on her own in the pediatrics department. She attributed that to their being more protective of their young patients. Nevertheless, on her own she did the admissions paperwork, assessed the patient and charted the patients.

Gordon then worked on the med-surg unit and was assigned another preceptor. For a time she was told by the night supervisor that she could "come off" her internship, and was assigned to work two evenings on her own in that unit as a regular staff nurse.

She continued as an intern and worked in the labor/delivery department for two months. Gordon stated that she believed that she would be hired in that department following her internship. She quoted Karsos that "when you complete the three month internship we'll figure out where we need you and you will be placed on a floor."

In L&D, Gordon was assigned a preceptor but, on her own, drew blood, placed a patient on a fetal monitor, and administered medications. The post-partum unit was short staffed and the nursing supervisor assigned her to work there which she did two or three times on her own with no other nurse present. In that unit she started and maintained intravenous lines, administered medications, assessed patients, changed dressings, and cared for the newborns.

Gordon's employment ended because of a dispute about her duties. Gordon testified that an L&D nurse told her to help in the post-partum unit because that unit was short staffed. Gordon asked the nurse on call whether she should help the nurse or take her own patients. The nurse said that she was to help only. Another nurse who was ending her shift asked Gordon why she could not take the ten patients. Gordon said that she was just supposed to help and was "on orientation." Gordon called the nurse on call who said that Gordon should take her own patients. Gordon took five patients and the other nurse took five patients.

At the end of her shift, Gordon was told by the L&D nurse manager that "this isn't working out" because she refused to take patients, and that she was argumentative. The manager then fired her. Gordon stated that she did not believe that the Respondent treated her fairly.

Nicole Cabrera testified that she was interviewed by three people, one of whom may have been Karsos. She was told by someone who she could not identify that "some people would be offered positions."

Cabrera worked in the med-surg unit for her entire internship period. She stated that she was not always assigned a preceptor when she worked in that unit. She was told the names of the night nurse and her "resource person" to whom she could ask questions or request help.

She began patient care responsibilities after three or four days in the med-surg unit at which time she cared for one to two patients. As her internship progressed, she was assigned more patients, up to three or four. She stated that on the first day she began caring for patients

she was not precepted. She was told that she could ask a particular nurse, as a "resource person" any questions that she had.

Cabrera stated that another nurse, either a preceptor or another staff nurse, was not always present when she performed a nursing task for the first time, and that during her internship she performed nursing duties without another nurse present. Further, she stated that, alone, she did patient assessments, administered medications, began intravenous lines, changed intravenous sites, changed tubing and did wound care. When she was assigned to a patient with a heparin drip she adjusted the drip rate using the chart's instructions. She was not assigned to a preceptor who watched her performance in that instance, nor did she receive help from another nurse. In fact, she stated that when she sought help with the drip she asked her resource person a question. Her response was that Cabrera had the same nursing license that she did and it was not her (resource person's) responsibility, rather it was Cabrera's responsibility because she had a license, and Cabrera should know how to do that procedure.

No one told Cabrera that there were any limitations on the types of tasks she could perform because she was an intern, and she did not notice other staff nurses performing duties that she did not perform. During her internship Cabrera was paid $7.50 per hour. After she completed the program Cabrera was hired to work in the med-surg unit and her salary was increased to $31.58 per hour. Upon her hire there was no difference in the type of tasks she performed as a staff nurse compared to what she did as an intern. Thereafter, Cabrera resigned and began work elsewhere.

After graduating from nursing school, Maria Evangelista met with Kharonov and told him that she was interested in working in the ER. He told her that positions were available in that department, and offered her a position there. She replied that as a new graduate with no experience she did not want to begin work in the ER. Kharonov mentioned the internship program where she could obtain experience in the ER. He explained that the program's duration was a few weeks to about two months, and was unpaid. He told her to complete the internship and then "we will see" about permanent employment.

After the one day hospital-wide orientation and an RN orientation conducted by Diane Russo, Evangelista began work in the med-surg unit. She worked there for about three months. She was told that Vaine Choi would be her preceptor who she should follow. Choi was assigned three to five patients per day. They checked the patients, did assessments, administered medications, and Choi showed her how to write patient notes.

The number of patients Evangelista worked with increased gradually, with five being the largest number of patients she cared for on her own. She stated that from the first day with Choi she performed patient care with her own patients in the absence of Choi. Such tasks included starting intravenous lines, hanging intravenous bags, drawing blood (after being shown by Choi), speaking to physicians and doing patient assessments.

No one told her, when she began working alone, that there were any limitations on what type of nursing tasks she could perform because she was an intern. She did not see other nurses performing tasks that she did not perform.

There reached a point where for one or two weeks Evangelista was taking care of a full complement of five patients with little or no help from Choi. At that time, Choi, Deering and other nurses told her that she was "ready" to conclude her internship. She was then absent for the two weeks that Choi was on vacation, believing that since she followed Choi's schedule, she should be absent when Choi was absent. When Evangelista returned to work she asked Kharonov if she could have a position in the ER when her internship was completed. He told her to speak to

Russo. Russo asked where she had been for the past two weeks and Evangelista explained, as above. Evangelista asked if she was finished with the internship and requested that she be assigned to the ER department. Russo replied that she could not return to the internship program after being absent for two weeks and that she would have to start the internship program again. Evangelista refused and left the Hospital.

Michele Carullo was one of the first three nursing school graduates to enroll in the internship program. She began in early May, 2011. She started taking care of patients in the step-down unit of same day surgery where she worked for two to three weeks. She was precepted for the first two days and shown how to take care of the patients. She stated that for the next 12 to 19 days she was able to care for the patients on her own without another nurse being present. If she had a question she could ask another nurse who was there. The tasks she performed included assessing the patient and determining whether he could be discharged, giving discharge instructions, removing intravenous lines, and calling for transportation.

Carullo then worked in the admissions department for same day surgery. She did not work with a preceptor. She took the patients' medical history, documented their charts, obtained medical records for surgery, asked if they ate or drank before surgery, and performed blood sugar, pregnancy and other tests.

Carullo was then assigned to the med-surg department, working in PACU. She was paired with a nurse because she was not certified in advanced cardiac life support. She worked there for two to four weeks with two other interns. The nurse who worked in that unit had eight to ten patients who were divided among the three interns.

Carullo then worked on the med-surg floor for about three to four weeks. The patients of the nurse in charge were divided among the three interns, each having three to four patients. She was not assigned to work with a preceptor there. She did nursing work on her own including administering medications, hanging intravenous bags, sending a patient for tests, and calling a physician if a test was returned with a critical value. She was not told that there were any limits on the work she did as an intern and did not see other nurses performing nursing tasks that she was not performing.

Moser testified that Karsos asked her and the two other interns, Carullo and Eric Wielenga, if they were interested in working per diem shifts on the weekends in the med-surg unit where they were then working as interns, since the hospital needed extra nurses for the weekends. Karsos said that they would be paid at the per diem rate. Moser and Carullo said that they were interested. One week later, Karsos told them that she could not have them work as per diem employees because "if we were per diem, we would be members of the union and that could cause confusion with the internship."

Moser testified that later, Donna Ortiz, the perioperative manager asked whether she, Carullo and Wielenga, who were then interns, were interested in working as per diem nurses in the same day surgery department and in admissions. She and Carullo agreed. They worked 10 shifts consisting of one weekend and the remainder during the week. She was paid the internship rate of $7.50 per hour for her work as an intern and the per diem rate of $46 per hour when she worked as a per diem.

Carullo stated that during her internship, manager Kunish offered her, Carullo and Wielenga paid evening shifts as an "incentive. "She and Moser did such work for about three weeks, about one to two paid shifts per week in the admissions department, the step down unit and the pain management unit. She worked in her internship during the day, earning $7.50 per

hour, and was paid $46 per hour for her evening per diem work. She performed the same work as an intern as she did as a paid per diem employee.

Carullo testified that nurse manager Donna Ortiz ended this practice, telling Carullo that she could not work per diem shifts while an intern because if she did so she would be considered a staff nurse, and as such she "should have been in the union and it was an issue. We couldn't do the itntersnhip and work per diem."

Karsos denied offering Moser per diem work in the med-surg unit during her internship.

Karsos testified that she told Ortiz that the Carullo and Moser could not work as interns and as per diem staff nurses because they were supposed to be learning, and it would also be a "payroll nightmare" to determine how to pay them two different rates.

Ortiz testified that the RNs in the same day surgery department told her that since Carullo and Danielle Moser worked in that department they had the orientation in that area and knew that area but were still employed as RN interns. The RNs asked if the two could perform per diem work because there was a lot of work and they wanted to make more money. Ortiz replied that she would check. Ortiz asked Karsos and then told the two interns that they could perform such evening per diem work. Thereafter they worked per diem shifts for three or four weeks. Karsos later told Ortiz that they could not work as per diems because they were receiving pay at two different pay rates, as an intern and as a per diem, which was difficult for the payroll department to process. They were not permitted to continue work as per diem nurses.

Ortiz denied being told that their work at a per diem rate was a problem regarding the Union.

Carullo worked in the perioperative area of the OR as a "team nurse" in which she and the two other interns worked with Alfie Sisson, the first assistant nurse. One intern circulated the room and set it up. Another scrubbed during surgery and distributed instruments. The third obtained needed supplies. Carullo stated that she worked as a circulating nurse and a scrub nurse in the OR. She opened a sterile field, set up the back table with the needed instruments, and assisted the surgeon. After about one month in the OR, Sisson believed that Carullo was "comfortable" handling a case and permitted her to circulate on her own and do a simple case such as the removal of a cyst.

Karsos stated that an intern could properly work as a circulating nurse in the OR. However she should not be working alone in that capacity without a preceptor present.

Carullo stated that toward the end of her internship she was permitted to handle "any and all" types of operations independently. Upon the completion of her internship she worked as a staff nurse in the OR.

Danielle Moser was interviewed for the internship program by Kunish who said that the program would be for six months and was unpaid, with specific training for the OR. Kunish told her that there would be "no guarantee of employment" after the program ended, and that only the best interns would be considered for employment.

Moser was one of the first three interns who began the program. Her first assignment was in the admissions department for same day surgery. She was assigned to work with a preceptor for the first three days during which time she did not perform any work on her own

without the preceptor being present. Moser shadowed the preceptor, watching how she was working.

Moser first testified that after the first few days she received her own assignments, working independently on her own and was not assigned a preceptor. She later stated that she was occasionally assigned a preceptor after the first few days. Moser worked in that unit for about two weeks. She prepared patients for surgery, took their history, did a brief physical examination, took their vital signs and gave pregnancy tests.

With those patients she, on her own, administered medications, checked their dressings, removed intravenous lines, and made sure that they were able to eat and drink, and prepared them for discharge.

Moser was then assigned to the PACU where she worked for about one month. She monitored the patients to make sure that they were recovering well from surgery. She was assigned a preceptor there. She did not do anything on her own without a preceptor present for her entire tenure in PACU, and she always worked with a preceptor there.

Moser was thereafter assigned to med-surg for about two weeks. During her first few days she worked with a preceptor. The three interns were together in the med-surg unit and shared one preceptor. The preceptor was not always present when the interns did their nursing work. After the first few days and during her entire tenure in med-surg, Moser received patient care assignments which she performed on her own without a preceptor being present. She performed, alone any tasks relating to patient care including administering medications and narcotics, making narcotics counts, doing daily assessments, bathing and moving the patients, changing dressings, and preparing them for surgery.

She was not told that there were any limitations on the type of work she could do because she was an intern. She did not notice that any other nurse in that department performed work that she did not do.

Karsos stated that the interns should have worked with their preceptors in doing narcotics counts at the start and end of their shifts. She was not aware that no preceptors were present when interns performed narcotics counts.

Moser worked one day shadowing a nurse in the wound care unit. She also worked for about one week in the sterilizing processing department sterilizing instruments. Other registered nurses do not perform such work.

For about two months, Moser worked in the OR taking patients' histories, completing all paperwork, preparing the OR, obtaining medications, preparing patients for surgery, assisting the anesthesiologist in positioning the patient, putting the patient to sleep and waking him up. When she was first assigned to the OR she worked with a preceptor or another nurse, primarily Alfie Sisson, but depending on staffing circumstances, she occasionally followed other nurses. Sisson showed Moser what had to be done, explained the equipment needed, how to set up the sterile field and how to position the patient. At times she worked in the OR without a preceptor or another nurse being present.

Moser testified that after completing six months as an intern, she told Kunish that she wanted to take maternity leave and asked whether she would have a job when she returned, noting that she had completed the full six month internship and believed that she was prepared to be a full-time staff nurse. Kunish told her to take maternity leave but when she returned she would continue as an intern at the intern pay rate until she was ready to "function independently."

A couple of weeks later, Moser told Kunish that she was taking maternity leave but would not return as an intern, explaining that she had been working independently in the OR for several weeks and wanted to return as a staff nurse in that department at the staff nurses' pay rate. Kunish replied that she had spoken with other people and had determined that she was capable of working as a staff nurse and that, when she was ready, she could return as a full-time nurse in the OR. When Moser returned from maternity leave she worked, at her request, on a part-time basis as a staff nurse in the OR.

Dudsak stated that in March, 2012, she encountered two interns who claimed to be nurses, but then said they were interns. They were providing care for a patient and asked Dudsak a question that a nurse should have been able to answer. Dudsak asked where their preceptor was and they said they had none present but noted that a nurse was at the nurse's desk. Dudsak asked that nurse, Bernadette Managie, for the name of the preceptor. Managie replied that in the past there were more staff nurses on the floor with a few interns, but now there are fewer staff nurses and more interns, causing the interns to be listed on the assignment board as being assigned to patients. Dudsak later asked Karsos if she recognized the name of either of the interns and she said she did not.

Dudsak stated that intern Carullo, who she was precepting, reported to her that she would not be working with her the following day because she was assigned to work in same day surgery to replace a staff nurse who would be absent. Dudsak told Donna Ortiz, the supervisor of surgical services, and Karsos, that the interns could not be considered as part of the staff, and should not be covering a shift. Karsos agreed, and Carullo did not cover the nurse's shift the following day.

2. Evidence of Preceptorship of Nurses at the Respondent and at Other Hospitals

In an effort to prove that the RN interns at the Hospital should have been included in the contractual RN unit, the General Counsel adduced evidence from staff RNs who were employed at other hospitals, at Liberty and at the Respondent. This evidence was offered to prove that the interns performed the same work as RNs and that their internship program was similar to orientation programs undertaken by employees who were hired as regular staff RNs.

Those RNs were not employed in an RN internship program at those facilities, but rather were hired as regular staff RNs following graduation from nursing school and were considered, and paid, as regular staff RNs at the staff RN pay rate.

a. Newly Hired Nurses, Experienced Nurses or Nurses Transferred From One Unit to Another

Newly hired RNs completed an "orientation" program at the facilities in which they were hired. The General Counsel argues that the Hospital's orientation program for the RN interns was similar, if not identical, to the orientation programs RNs receive at the Respondent's facility. He argues, therefore, that the RN interns here should have been considered as regular RNs at the start of the orientation program and included in the RN bargaining unit as alleged in the complaint.

Testimony was given concerning the hire and orientation of RNs. Karsos testified regarding the general process of nurse recruitment. She stated that if she identifies a position for which she needs a nurse or if there is a vacant position, the nurse manager completes a position requisition form, Karsos approves it and submits it to the Board for approval, and then to HR for posting. Nurses send resumes to HR, which forward the resumes to her.

The nurse manager interviews the applicants, but occasionally, Karsos does so. However, the manager makes the final decision on whether to hire an applicant. Then, HR schedules the new hire for a pre-employment physical and she is scheduled to attend the next general orientation.

The hospital accrediting organization requires that certain standards be met in order for a hospital to be accredited. One requirement is that nurses receive an orientation to ensure that they are familiar with hospital and department policies. Karsos stated that a new nurse, even if she is experienced, must complete an orientation. A general one-day orientation with all new employees including the RN interns is held to acquaint the new nurse with general Hospital policies and procedures.

Karsos stated that when a nurse having experience in a particular unit is hired, she is given a general, two-day orientation in the unit in which she is assigned. She is given a preceptor and learns the documentation tools. The nurse to patient ratio is one to six. Thereafter the preceptor and nurse care for the same patients.

The preceptor and manager evaluate the new hire for her competency generally after one week of her hire. The new nurse is not assigned to her own patients. Factors such as the department to which the nurse is assigned, the number and conditions of the patients in the department, the experience of the nurse being oriented, and specifically whether she had been trained to care for the type of patients in that department, are all taken into consideration. Generally, a nurse with experience receives a two to three week orientation, during which she is not counted toward the staffing numbers for that unit. The purpose of the orientation for a nurse who is transferring from one unit to another and for newly hired nurses is to ensure that the nurse can work independently. The preceptor is paid premium pay for engaging in this experience. She added that the new nurse is paid at a different pay rate depending on her prior experience.

Karsos stated that the Employer hired nurses from a nursing personnel agency when it did not have per diem nurses on duty in that department. The agency nurse must be experienced in the area she is assigned to. She receives a one hour orientation and is expected to be “ready to go” immediately by taking a patient load. Agency nurses were employed by the Hospital in 2011 and their use was ended in late 2011 when 3 West was closed. Agency nurses were counted toward the staffing-census ratio.

Karsos stated that the amount of time it takes for a nurse in one unit to transfer to other specialized units such as the OR, L&D or med-surg – even for an experienced nurse but with no prior experience in those units, was lengthy. She opined that it would take a nurse with many years of experience in the med-surg department a minimum of six months to work somewhat independently as an OR nurse; and a minimum of three months to be somewhat comfortable in the L&D department, but several months to function independently there.

Nurse Deborah Deering testified that newly hired nurses with experience receive one day of orientation on the unit and shadowing, and for the next two to three days, work with the preceptor. They then are evaluated by the nurse educator who decides, based on the evaluation given by the preceptor, if they are ready to begin work on their own.

Following her graduation from nursing school, Lucia Job worked as a staff nurse at Palisades Medical Center, receiving one week of classroom orientation and 8 to 12 weeks of orientation where she worked with a preceptor on patient floors. They worked together initially

and then when the preceptor believed that she was "competent" she was "on my own." She was paid the same rate during her orientation as when she started work there as a per diem nurse.

Job began work for at Liberty in 1999. She was hired to work in the telemetry department. She received an orientation consisting of six weeks of classroom work and 8 to 12 weeks on the telemetry floor. She did routine patient care and was paid the same rate during her orientation period as when she began as a regular RN.

Job then worked as a per diem nurse at Hoboken Medical Center in 2009. She received orientation consisting of one week of classroom training and six – 12 hour shifts in the ER. She was precepted by a nurse for six shifts. She received the regular per diem rate during her orientation.

After she quit work at the Respondent, Elizabeth Dombrowski began work at Kaiser Institute in March, 2012. She was oriented with a preceptor for three months during which time she had a patient load. She stated that the experience was similar to that at the Respondent, where she began with a small patient load and then took on a larger load on her own. Her pay during orientation remained the same when she began work full-time following her orientation at Kaiser.

Stephanie Orrico testified that when she began work at Englewood Hospital in 1974 following nursing school, she received orientation training for four months, consisting first of a general orientation to hospital policies and then to generic nursing skills, and then to her specific area of interest. She received classroom and clinical training, the latter during her four month orientation period. During her clinical training she worked with a preceptor – at first "shadowing" her, becoming familiar with routines, medications, physician's orders and charting and then caring for one or two of the preceptor's eight patients while being watched by the preceptor. She progressively received more responsibilities as she became more proficient - eventually caring for all the patients with the preceptor. She received the same pay during orientation as she did after the orientation ended.

Orrico also worked as a preceptor at Englewood Hospital for its one-year nurse internship program. The first four months consisted of a general orientation to hospital policies and then an orientation to the skills the nurse must have, such as starting intravenous lines and drawing blood. At the end of the four months, the nurse is expected to function independently and take a patient load and be counted in the nurse/patient ratio in the hospital.

However, Orrico also stated that following the four month orientation, there was a more specific orientation in the area where the nurse will practice, consisting of classroom work and work with a preceptor. The intern's competency in various skills is graded. The intern receives the same pay as a newly hired nurse. However, a nurse with experience may receive a higher starting rate of pay.

Orrico stated that the work of precepting a nurse intern and a new hire orientee who is not a participant in the nurse internship program is the same. The initial four months for both nurses is also the same. However, the additional eight months of training the intern receives is not included in the newly hired nurse's program.

Madeline Gordon testified that following her internship at the Respondent, she undertook a three month orientation program at Palisades Hospital. It included one week of classroom work and also work in a med-surg unit with a preceptor. She followed the preceptor and her schedule, working five days per week and weekends. She began with caring for one patient and then her patient load was gradually increased to a full complement of patients as she

progressed. Gordon testified that the program was similar to that of the Respondent except that she was paid at the regular nurse starting rate while at Palisades Hospital.

Following her internship and hire in the med-surg unit at the Respondent, Nicole Cabrera left the Hospital and obtained a position at the University of Medicine and Dentistry New Jersey (UMDNJ) where she received a general three day procedure orientation and then worked on a nursing floor. She followed her preceptor's schedule for about one month. She was not permitted to do anything unless the preceptor was present and "signed her off" as being competent to perform that skill. After that period of orientation she worked on her own as a staff nurse. She noted that this preceptorship was very different than her internship at the Respondent since at UMDNJ the resource person was always present, and she knew that there was one specific person she could contact with questions.

Following her work at UMDNJ, Cabrera worked at Hackensack University Medical Center where she received an orientation with a preceptor who she shadowed and accompanied her when she did assessments or administered medications. She emphasized that at both UMDNJ and Hackensack, she was assigned her own patients without a preceptor being present. At those facilities she received the salary of a staff nurse during her orientation and, of course, when she became a staff nurse.

Michele Carullo left her employment at the Respondent and began work at a surgical center. She received one-on-one orientation with a nurse. After about three months, when that nurse believed that Carullo was able to handle cases on her own, she did so. During her orientation period she received the same pay as when she worked as a staff nurse following her orientation.

Following her work at the Hospital, Danielle Moser worked at a same day surgery center in New Jersey. She received an orientation there with a preceptor for about two months. She received the same pay rate during her orientation, and after she completed it when she worked as a staff nurse.

b. Evidence from Preceptors at Liberty and at Other Facilities

Lucia Job acted as preceptor at the facility when it was owned by Liberty. During that time she worked with two newly graduated nurses, assessing the patients. She made sure that the intern assessed the patient properly. They were paid the same rate as entry level RNs.

Barbara Rosen, a Union official and nurse educator at Bergen Medical Center worked as a preceptor there. She stated that the orientation program is generally six weeks for new nursing school graduates and four weeks for nurses with experience. The program begins with classroom work, a general overview of hospital policies, and has specific training in their areas with a preceptor being assigned to them. At the end of each week, the orientee meets with Rosen, the preceptor, and the nurse manager, all of whom review a checklist of competencies the orientee must meet.

Rosen stated that the orientee observes the preceptor and then slowly the patient assignment is transferred to her. On her first day, the orientee is responsible for one or two patients. Rosen emphasized that the preceptor is always with the orientee during the entire orientation period, working together in patient care assignments. Similar to the experience at the Respondent, Rosen stated that the orientee progresses at her own rate, adding patients to her complement, depending on her competency.

During their orientation, the orientees receive the regular staff nurse rate of pay. Rosen stated that she reviewed the collective-bargaining agreements at about 20 other facilities and found that in each the orientees were paid the regular staff rate.

c. Evidence from Preceptors at the Respondent

Lucia Job was an ER nurse at the Hospital for about 10 years when she began precepting interns. The internship period was 8 to 12 weeks depending on how quickly the interns progressed. Job stated that in about mid-November, 2012, she was told that she would precept interns in the ER. Those interns had been working on the nursing floors before they went to the ER. She was not given any specific materials to use in precepting them, and she was not told to precept them any differently than any other nurses.

Deborah Deering was a charge nurse on 3 West, a 39-bed unit for med-surg and telemetry patients. There are six nurses on the day shift with each nurse having her own station which includes a medication cart and mobile computer desk. Her duties include assigning patients to the nurses on her shift depending on the census of patients on the floor. She serves as a resource person, being available to answer questions concerning patient care and policies.

Deering defined a "preceptor" as one who guides the new nurses, instructs them and watches their work. She was a preceptor for 25 years, having been trained to perform that function. She stated that it was not uncommon for RNs to receive an orientation if they transferred from one unit to another. If they were experienced their orientation was shorter. Likewise, if a nurse had prior experience in a particular unit and was returning to that unit she still received one day of "shadowing" in which she was shown where various items were, and was introduced to the charting system.

Deering precepted newly hired RNs who arrived from other hospitals. They received one day of orientation to the unit to which they were assigned. They are instructed in computer use and they "shadow" the preceptor for one day, watching her work with her patients. For the next approximately 20 days they work with the preceptor. They are then evaluated by the educator who decides if they are ready to begin working on their own as a staff RN.

3. The Hire of Interns Following their Internship

Karsos' pre-trial affidavit stated that when an intern completes the program she may be hired as a per diem nurse once the Hospital is satisfied that she can handle a full patient load, and that the Hospital generally hired an intern if a vacancy was available. However, at hearing, she stated that such is the case if a position is available and the intern applies for the position and if there are no other candidates for the job. She added that it was her practice that if there was a vacancy and an intern was available who demonstrated her ability to perform as a staff nurse, she would nevertheless seek to hire a more experienced nurse because having "all new nurses is not a good thing."

Karsos emphasized that there were no vacancies for nurses at the time the internship program began, stating that the purpose of the program was not to provide employment opportunities for the nurses at the Hospital. However, she conceded that later, after their completion of the internship, some interns were hired as full-time staff nurses and some as per diem nurses. Many left the Hospital after their internship ended.

Karsos denied speaking with the interns during their internship concerning when the internship would end, or their likelihood of being hired by the Employer. She did not believe that

all the interns would be hired following their completion of the internship because there were too many of them. Rather, she believed that many would not be hired.

Karsos stated that, following the end of the internship, the intern typically asked her if there was a staff nurse position available in the Hospital, including a position as a per diem nurse. Karsos directed them to a board where openings were posted and also advised that they ask the manager about available positions.

Karsos stated that not all nurses are hired as per diems. She noted that a per diem nurse is not guaranteed to work a specific number of hours. Rather, the Hospital adjusts its staffing needs each day, with the per diems being the first nurses to be cancelled. Nevertheless, Karsos noted that the Hospital always recruits for per diem nurses.

Karsos stated that following the internship it was possible that an intern would be hired inasmuch as turnover in positions occur. Therefore, as a position opened, she might apply for that position and would then have to undergo orientation in that job.

A document entitled "Nursing Internship 2013," a PowerPoint presentation containing general instructions for care such as documentation requirements, use of restraints, and patient bill of rights was, according to Karsos, used exclusively for the interns. Other documents such as a medication test, glucometer recertification, transfusions post test, HIPPA test, and a general test of medical knowledge and procedures were used for the interns and other RNs as annual competency exams.

Several interns have their hire date listed as the date of the one-day orientation program required of all new hospital employees.

For those nurses in the May, 2011 to November, 2013 internship program, 54 interns were hired as RNs immediately after their internship ended. Eight other interns who completed the internship program were not hired following their internship.

Of the entire internship program comprising 94 interns, the Respondent hired 17 as regular staff RNs and 37 as per diem RNs.

Karsos stated that more interns were hired as staff nurses than those who were not hired in that capacity. Karsos stated that of the 9 interns who were not hired as staff nurses, at least seven resigned or were discharged. Thus, at most two completed the program without incident but were not hired as staff nurses. The rest of the interns were either hired as staff nurses, resigned or were discharged from the program. She did not contemplate, at the start of the program, that those interns would be hired at the end of the program.

Nurse Interns Danielle Moser, Michelle Carullo and Eric Wielenga became Staff RNs and were assigned to work in the OR one day after their internship ended.

As to the interns hired as per diem nurses, Karsos stated that generally, per diem nurses are those with two to three years of experience who are "ready to go" with no additional training, as an agency nurse would function. She did not believe that the new internship graduates with a six week maximum period of training were qualified to function independently. Nevertheless, some interns asked for a position and the manager hired them as per diem nurses. Karsos stated that that would not have been her choice. As to the interns hired as per diem nurses immediately following the completion of their internship, Karsos stated that they were not qualified, explaining that she did not control the hiring process "to that extent."

Nevertheless, the Hospital hired 37 of the 94 interns as per diem nurses immediately following the completion of their internship. If they were hired as per diem nurses the Hospital must have believed that they were "ready to go" as were other per diem nurses, regardless of Karsos' belief that they were not qualified.

As set forth above, Karsos stated that the Hospital "generally hires RN interns if a vacancy is available" and that they "may be hired once the Hospital is satisfied that he or she can handle a full patient load."

Indeed, based on the above record of hiring interns as staff RNs and per diem nurses the day after their internship was completed, it must be said that the newly hired RNs were deemed capable of handling a "full patient load." Although it was apparently not Karsos' choice that they be hired because she deemed them "not qualified," nevertheless they were hired and worked as regular staff RNs and per diems. Karsos, as the chief nursing officer who oversees the entire nursing department, certainly would have had the authority to prevent the interns from being hired if she deemed them to be not qualified. She did not do so, however, and instead, permitted their hire.

Discussion

The complaint alleges that the Respondent refused to bargain with the Union by refusing to include the RN interns in the RN bargaining unit. The General Counsel alleges that the nurse interns performed the same work as the regular staff RNs, and received the same orientation as that provided for newly hired staff nurses or those transferring from one unit to another.

The Respondent argues that the interns were enrolled in a training program, they were not promised employment after their orientation period ended, and were not statutory employees. The Respondent further contends that the interns did not perform the work of a staff RN and are not properly a part of the RN bargaining unit.

The General Counsel argues, and I agree, that the nurse interns performed the same work as regular staff RNs or per diem nurses.

Interns Carullo and Moser performed work as regular per diem nurses. As set forth above, human resource manager Kunish offered interns Carullo and Moser extra, paid evening shifts as an "incentive" and they did such work for one or two paid shifts per week for about three weeks. They earned the regular per diem rate for such work. Significantly, Director of Nursing Ortiz testified that Karsos, the Chief Nursing Officer, approved their per diem work.

Karsos ended their per diem work, telling Ortiz that their work at two different pay rates, daytime at $7.50 per hour as interns and evening at $46.00 per hour as per diems was difficult for the payroll department to process. The testimony of Carullo and Moser are more believable concerning the reason their per diem work was ended. They stated that they were told that if they worked as per diems the Union would claim that they should be included in the RN contract and that could be a problem. Karsos conceded that there was "talk about that" meaning that the Union would claim that that if they worked as per diems they should be included in the RN unit.

The most significant aspect of the Carullo and Moser's work as per diems is that there is no evidence that Karsos told Ortiz that Carullo and Moser were not qualified to perform work as per diems because they were interns. Rather, Karsos told Ortiz that it would be a problem for the payroll department to process two different salary rates.

The Board has long held that nurse permittees and graduate nurses, who were not licensed as RNs, are properly included in a unit consisting of registered nurses or in a unit consisting of professional employees which also includes RNs.

In *St. Mary's Hospital*, 220 NLRB 496 (1975), the union filed a petition seeking, inter alia, a unit of registered nurses. Of the 200 RNs the hospital was authorized to employ, about 14 were nurse interns, defined as those who were nursing school graduates but had not yet been certified by the State of Florida.

The Board included the interns in the unit of registered nurses. It noted that despite the fact that neither the employer nor the petitioner took a position as to whether the nurse interns should be included or excluded from the unit, the Board included them in the unit of registered nurses, stating that it finds that "in view of their training and working conditions" the nurse interns are professional employees" who should be included in the unit. 220 NLRB at 497, fn. 3. The Board noted that all new employees, including RNs, take a two-week orientation program. All the employees train together for the first two days, and then are divided into groups based on their job classifications. The instructors can extend the employee's orientation period if she is not performing as expected.

In *Mercy Hospitals of Sacramento, Inc.,* 217 NLRB 765, 768 (1975), the Board included "nurse permittees" in a unit of registered nurses sought by the union. Nurse permittees are nurses who have graduated from accredited nursing schools and have either taken or are about to take the registration examination required by the State to become licensed as registered nurses. Until such time as they receive notification that they have passed the examination, the nurse permittees work under state permits performing essentially the same functions and duties as the registered nurses, under supervision of a registered nurse, except for the handling of narcotics. The average length of time before a nurse permittee becomes a registered nurse is less than 3 months. The Board found that the nurse permittees, "by virtue of the nature of their training and working conditions, are professional employees within the meaning of the Act" and were included in the registered nurses bargaining unit.

In *Sisters of Mercy Health Corp.,* 298 NLRB 483, 486 (1990), individuals who have completed their RN training and graduated from nursing school thereby become "graduate nurses." Upon graduation the employer began paying them the starting wage scale of RNs despite the fact that they had only been issued a temporary license certifying them as graduate registered nurses.

The Board, citing *Mercy Hospitals*, above, noted that it has a long history of including graduate nurses in bargaining units with RNs, reasoning that "graduate nurses are professional employees like RNs because they have completed the extensive medical training required to be an RN, perform the same functions and duties as an RN, and share the same working conditions with the RNs." In including the graduate nurses in the registered nurses unit, the Board noted that the employer presented evidence that its graduate nurses meet these criteria, and significantly noted that "the graduate nurses work for the same pay, under the same supervision and perform substantially the same work as do the RNs. Graduate nurses also undergo an orientation program required of new RNs."

In *Saint Anthony Center*, 220 NLRB 1009, 1012, (1975), the union sought a unit of nonprofessional employees. The employer sought to include in that unit nurses who were graduates of foreign nursing schools while the union sought to exclude them as professional employees. The Board excluded them from the nonprofessional unit noting that they "appear to perform substantially the same duties, to possess the same educational and training

background, and to face the same impediment in their pursuit of their RN status in the United States as did the employees classified as "nurse permittees" in *Mercy Hospitals,* above. The Board excluded them from the unit of nonprofessional employees because they were professional employees.

In *Meharry Medical College,* 219 NLRB 488, 489–90 (1975), the employer's graduate nurses are those who have graduated from accredited nursing schools and have either taken or are about to take the registration examination required by the State to become licensed as registered nurses. Until such time as they receive notification that they have passed the examination, the graduate nurses work under state permits performing essentially the same functions and duties as the registered nurses, under the supervision of the director of nursing, except for the handling of narcotics. Both the employer and the petitioner took the position that graduate nurses should be included in the bargaining unit with registered nurses, whereas the intervenor opposed their inclusion. The Board found that, based on the nature of their training and working conditions, it included the graduate nurses in the unit of registered nurses.

The facts in the instant case are much stronger than those in the above cases for a finding that the RN interns should be included in the RN unit. Thus, in none of those cases had the nurse interns, nurse permittees or graduate nurses received their licenses from the state as registered nurses. Further, some had not even taken the state licensing exam. Moreover, some were not even permitted to handle narcotics. Nevertheless, all of them were included in the registered nurses' unit.

Here, all the nurse interns had taken the state licensing exam and received their RN licenses. They were thus more qualified to be included in the unit of registered nurses than the non-licensed nurses above. Moreover, here, all the nurses were permitted to handle narcotics whereas in *Mercy Hospitals and Meharry Medical College*, they were not permitted to do so.

Importantly, in the above cases in which the non-licensed nurses were included in the registered nurses unit, the Board found that they worked under the same supervision and "performed substantially the same work as do the RNs."

Here too, the the record extensively details the fact that the nurse interns performed substantially the same work as regular staff registered nurses. Although they were precepted by staff RNs, they worked under the overall supervision of Ortiz and Karsos, as did the regular staff RNs.

Without repeating all of the above evidence, I note a few examples. Karsos testified that by the fifth day of the intern's work the goal was that the intern would be able to provide "complete care" for the two patients she was assigned under the supervision of the preceptor.

Whether or not the intern was working independently, on her own, or under the watchful eye of the preceptor , she was providing "complete care" for her patients. The interns testified that they hung IV bags, administered medications through feeding tubes, inserted catheters, administered narcotics, changed dressings, operated ventilators, did assessments. In the L&D unit, drew blood, placed the patient on a fetal monitor, and did assessments and charted the patients. In

The interns uniformly testified that they were not told that there were any limitations on the type of work they could do because they were interns, and they did not notice that any other nurse in the departments in which they worked performed work that they did not do.

As a further example, intern Moser told manager Kunish that she had been "functioning independently" in the OR for a number of weeks. Kunish told that following her internship she could work as a full-time nurse in the OR. Significantly, Moser and Carullo were asked by Kunish to work as regular per diem registered nurses at the RN pay rate in the evening while they worked in the daytime as interns. They did so for one or two shifts for a three week period of time. Their work stopped only on the order of manager Ortiz who reported that Karsos said that such a practice would be difficult for payroll to sort their pay. Significantly they were not told to cease working as per diems because they were not qualified to perform the work of a registered nurse.

In this regard I cannot credit the testimony of Karsos who gave as an additional reason for ceasing the practice, that the interns were "supposed to be learning." Clearly, they were deemed competent enough to perform regular shifts as per diem staff nurses even while they were learning.

In finding in the above cases that the non-licensed nurses should be placed in the registered nurses unit the Board noted that they received the same compensation and enjoyed the same working conditions as did the registered nurses. The fact that the interns here did not receive the same compensation as the staff RNs is irrelevant to the question presented here. The Respondent certainly could have paid the interns the same wages as the unit RNs but chose not to do so.

In this regard it is significant the interns Moser and Carullo worked as paid per diem employees while in the internship program. I credit the testimony of Moser and Carullo who testified that nursing officials Karsos and Ortiz, respectively, told them that they could not work as per diem nurses because if they did so they would be considered as staff RNs and would be included in the Union which was an "issue."

Thus, the Respondent did not pay them the RN wage scale because it was concerned that by doing so it would have to include them in the RN unit. There was no evidence that the interns were not paid the RN wage rate because the Respondent believed that they were not performing the work of a staff RN or a per diem nurse.

The Respondent argues that the fact that the interns were at times not paid at all, and also were paid the minimum wage of $7.50 supports a finding that they were not employees. The Respondent minimizes such payment by arguing that, as intern Carullo testified, she was told by Karsos that she was "able to pay us" for "gas and different expenses."

The Respondent's officials stated that the interns were paid so that they would be covered by the Hospital's malpractice insurance. The fact that the interns were covered for the purposes of malpractice insurance is some evidence that the Respondent could be held accountable for their improper actions as "employees." Indeed, Karsos testified that as licensed, registered nurses, they were permitted to perform work "to the scope of their practice" as registered nurses, and if they violated the standards of nursing practice which required reporting they would have to be reported to the State Board of Nursing.

The Respondent argues that interns enrolled in the internship program "in their self-interest to gain experience…." (Brief, p. 95). That may be true, but it is also quite apparent that the Respondent benefitted from the interns' provision of a minimally paid workforce that performed substantially the same work done by the registered nurses. Whether it was work performed under the supervision of the RNs or work done on their own with or without supervision, the fully licensed interns did substantially the same work as the staff registered

nurses. In *Meharry*, above, the graduate nurses also worked under the supervision of the director of nursing.

The experience of the following nurses is instructive. As set forth above, they were employed at the regular staff nurses pay rate at facilities other than the Respondent immediately following nursing school graduation and licensure, or were employed at other facilities following their internship at the Respondent and work elsewhere. Those nurses received orientations with preceptors for one month (Cabrera), two months (Moser), three months (Dombrowski, Gordon and Carullo), fourteen to 18 weeks (Job), and four months (Orrico).

Accordingly, I find that the orientation periods and the type of orientation received at the Respondent, classroom training and clinical work, was substantially similar to that received at other facilities for regular staff registered nurses. The difference was that in those cases the nurses received the regular staff nurse pay rate and here they were not.

Further, the U.S. DOL made a determination that the interns were owed a certain sum as unpaid wages as compensation for their work as employees.

The Respondent contends that an employer-employee relationship may only exist when there is an economic relationship contemplating remuneration for services rendered, citing *WBAI Pacifica* 238 NLRB 1273, 1274 (1999) and *Brevard Achievement Center*, 342 NRLB 982, 984-985 (2004). Both cases are easily distinguishable.

In *WBAI*, the Board found that the employees were unpaid and, to the contrary, they raised money or contributed money to the non-profit radio station for which they worked. They worked in the interest of the station being able to exist and thrive and for their personal enrichment of serving the community. Here, in contrast, the interns were not unpaid. They were paid $7.50 per hour and worked for a for-profit hospital in the interest of caring for their patients. Whether they used the money for gasoline or other expenses is irrelevant. The significant fact is that they were paid for their services.

In *Brevard,* the Board found that disabled workers in a "primarily Rehabilitative Relationship" with their putative employer were not statutory employees. The difference between the types of workers in *Brevard* and here and the types of work they did are obvious. Both cases are clearly inapplicable here where interns earned wages for their work in a primarily economic relationship with a for-profit hospital.

In *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941) the Court found that applicants for employment were statutory employees despite the fact that they received no compensation from the employer but only sought wage earning jobs.

In view of the long-standing, consistent Board precedent holding that nurse interns, nurse permittees and graduate nurses should be included in units of registered nurses, and in the absence of persuasive evidence or legal authority that the interns here should not be included in the unit of registered nurses, I find and conclude that, as alleged, the Respondent refused to bargain with the Union by refusing to include the RN interns in the RN unit.

The Respondent argues that even assuming that the interns are found to be statutory employees, they cannot be included in the RN contract because Section 1.2 thereof provides that the unit, specifically including certain categories of employees, does not expressly include nurse interns, but rather excludes "all other employees." It further contends that since RN interns are not considered RNs for the purpose of the staffing complement and are "temporary

employees" employed to work for a specified period, the length of the internship, they may not be considered as includible in the contract.

I do not agree. As illustrated by the above cases, the nurse interns are properly part of the unit which includes registered nurses. They were not temporary employees. They were hired as nurse interns who then completed their internship and most of whom immediately began work as staff RNs and per diem RNs. Indeed, Karsos testified that she sought to hire interns who would complete the program and who wanted to stay in the Hospital. Clearly she intended to hire those interns who would become a permanent part of the Hospital's registered nursing staff.

The Respondent further argues that even assuming that the nurse interns are included in the bargaining unit, they are not entitled to receive the RN wage rate because their position would be considered a "new job" under Article 22 of the contract. That Article provides that the Hospital has the right to create new jobs, and that when it does so, it only has a duty to meet with the Union to negotiate a rate for that job. I do not agree. The nurse interns do not constitute a "new job." They were registered nurses performing substantially the same work as the staff RNs which is the contractual bargaining unit.

In conclusion I find that the Respondent unlawfully modified the RN contract by refusing to apply it to the RN interns without obtaining the Union's consent. Absent the union's consent, a mid-term contract modification of a term governing a mandatory subject of bargaining violates Section 8(a)(5) of the Act. *Bonnell/Tredegar Industries*, above.

I further cannot find that the Respondent had a sound arguable basis for believing that the contract allowed such a modification. The RN interns clearly were employees who were entitled to be included as part of the contractual RN unit.

F. The Elimination of the 12-Hour Shifts

The complaint alleges that since about September 21, 2012, the Respondent failed to continue in effect all the terms and conditions of the RN and Tech contracts by eliminating employees' 12-hour shifts.

Appendix B of the RN and Tech contracts states that "the 12 hour shift will be offered in [certain specified units]. The employee has the right to return to his/her previous 7.5 hour shift, if mutually agreed upon and not unreasonably denied."

The contract describes the times of the shifts, the weekend work requirement, conference days, and states that vacation, holidays and sick days will be paid at 12 hours.

Prior to November, 2012, nurses worked three days per week in 12 hour shifts. Following the change, they worked five days per week in 8 hour shifts.

Dunaev stated that the nursing administration estimated that many or most nurses had a second full-time job at other medical facilities causing great pressure on them, especially where they are responsible for patient care. She was concerned about patient safety as a reason for eliminating the 12 hour provision.

In this respect, Dunaev testified that nursing management decided that certain "errors, incidents and mistakes" that occurred during the Hospital's two years of ownership could be avoided if the nurses' hours were reduced. She claimed that many nurses had "fatigue syndrome," were depressed and complained of long work hours, causing them to be less

attentive than required. Accordingly, nursing management decided, in the interest of patient and nurse safety, to eliminate the 12 hour shifts.

On September 20, 2012, Karsos decided to eliminate 12 hour shifts. The following day Pavisic sent a memo to Dudsak which stated that "in its continuing effort to provide quality of care and safety for its patients" the Hospital will eliminate all 12 hour shifts effective November 4, 2012." On September 25, Levine requested bargaining over the Hospital's decision.

A meeting was held on September 28 with Karsos, Levine and Dudsak. Karsos gave her reasons for eliminating the 12 hour shifts. She told the group that nurses would provide better care when they worked 8 hours and not 12. She told the Union agents that she was aware of "service issues" which could be attributed to nurses working 12 hour shifts. Such issues included patients being dissatisfied with nurse performance; the nurses did not know their patients very well; and physicians were not happy with the 12 hour shift arrangement. Levine asked how the change would be implemented, and Karsos said that she would ask for volunteers or hire new employees to cover the 3:00 pm to 11:00 pm shift.

On October 8, Pavisic notified the Union that it would implement the elimination of the 12 hour shifts. The letter stated that the Hospital had the right to assign work and change shift hours and denied that the Respondent was obligated to bargain with the Union over these matters.

The Union had already made a request for information concerning the12 hour shifts and claimed that it could not bargain regarding that subject without the requested documents.

At a meeting on November 13, 2012 or at another meeting on this subject, the Union protested that certain nurses had jobs elsewhere in addition to their work at the Hospital, and that the change to an eight hour shift would impact their other jobs. Dudsak stated that the nurses wanted the 12 hour shifts because it gave them more time with their families since they would be working only three days per week.

Karsos testified that, inasmuch as the 12 hour provision was located in an appendix to the contract, and not in its body, she considered that the provision was a "trial period" since employees need only be "offered" a 12 hour shift and was therefore not a guarantee of such a shift.

Discussion

It is well settled that unilateral decisions made by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are regarded as a per se refusal to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). It is also well settled that the "particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *Meat Cutters Local 189 v. Jewel Tea Co*., 381 U.S. 676, 691 (1965).

The elimination of a shift is a mandatory subject of collective bargaining since such subjects include wages, hours, and other terms and conditions of employment. A union can waive its right to bargain about a mandatory subject of collective bargaining but that waiver must be clear and unmistakable. See, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Dubuque Packing Co.*, 303 NLRB 386 (1991). There was no clear and unmistakable waiver to bargain over the elimination of the 12-hour shift here. See *Uforma/Shelby Business Forms, Inc*., 320 NLRB 71, 74 (1995)

The contract provided that employees "will be offered" 12 hour shifts. The Respondent, in its letter of October 8, denied that it was obligated to bargain with the Union about its impending elimination of the contractual 12 hour shift.

The Respondent bases its refusal to bargain on the contract's management rights clause which grants it the authority to "determine … the hours … of work…." In addition, that clause states that "all other rights are also expressly reserved to the Employer unless such other rights are abrogated by a clear and express provision of this Agreement." As noted above, the Union cannot be found to have waived its right to bargain over the elimination of the shift upon the general, unspecific management rights clause which did not specifically refer to the contractual 12 hour shift.

The parties contractually, expressly agreed to offer 12 hour shifts to employees. Dudsak told Karsos that the employees benefited from that arrangement because they enjoyed the extra time with their families. The Union refused to accept the change but the Respondent implemented it anyway.

Karsos and Dunaev gave plausible reasons why the change was needed. Reasonable parties may have been able to reach agreement on this matter but the Respondent foreclosed that opportunity by denying that it had any obligation to bargain about it. It is significant that the contractual agreement to offer 12 hour shifts had been in effect for nearly two years at the time the Respondent unilaterally eliminated it.

I cannot accept Karsos' testimony that the provision's location in the contract's Appendix indicates that it was implemented on a "trial basis." First, there was no evidence that the placement of the clause in the Appendix established that it was only a test or experiment. The provision had been in place and applied for nearly two years. There was no evidence that, prior to its elimination, the "trial basis" had been completed.

I accordingly find and conclude, as alleged, that since about September 21, 2012, the Respondent failed to continue in effect all the terms and conditions of the RN and Tech contracts by eliminating employees' 12-hour shifts. I find that the Respondent unlawfully modified the contract by refusing to honor this contractual provision without the Union's consent.

I also cannot find that the Respondent had a sound arguable basis for believing that the contract allowed such a modification. In determining the parties' intent in including this provision in the contract we must look at the contract language and the parties' past practice regarding the implementation of the contract provision. *Kmart Corp*., above. The contract language is clear – the parties' agreed that employees would be offered a 12-hour shift. The parties' past practice is also clear. The provision was honored and implemented for nearly two years at the time the Respondent unilaterally eliminated it.

G. The 401(k) Contribution

The complaint alleges that since about October, 2012, the Respondent failed to continue in effect all the terms and conditions of the RN, Service, and Tech contracts by refusing to make contributions to employees' 401(k) plans.

Two meetings on two consecutive days were held in September, 2010 with the Union and with the prospective owners, Dr. Lipsky and Dunaev. The Union asked the Respondent to assume the contracts it had with Liberty, hire all the predecessor's employees and make a seamless transition with predecessor Liberty.

The Hospital was willing to recognize the Union and negotiate contracts with it, but wanted certain economic modifications. It was agreed that the employees would continue their present status, and that their wages and benefits would continue as set forth in the Memorandum of Agreement.

One of the negotiation topics was that the Liberty contract provided for a 2% pension contribution by Liberty of its own funds to each employee's 401(k) plan. In addition, employees could make their own contribution to the plan, which Liberty agreed to match, up to 50% of the employee's contribution, or 1%.

The Union wanted that plan to continue in the same manner when the Employer began operating the hospital. According to Twomey, the Employer's attorney Michael Miller and Dr. Lipsky said that the Employer would make a 2% contribution of the Respondent's funds to the Plan in behalf of each employee.

However, according to Twomey, Dr. Lipsky said that the Respondent could not match employee's contributions as Liberty had. He said "this is something we want to do in the future, but we can't do now…. You guys are getting great wage increases, and we want to be able to do a retirement plan, but right now it's just going to have to be what it is, and then going forward we'll see what we can do to help people out."

Dunaev stated that at an in-person meeting with the Union on the second day of negotiations, Dr. Lipsky told Twomey that the Employer just purchased the hospital, saving it from closing, was hiring all the employees from Liberty, had agreed to grant a generous 2% wage raise, and was providing health insurance benefits. Dunaev said that the Hospital could not make a contribution to the 401(k) plan in behalf of employees. Twomey asked whether the Respondent would do so in the future, and Dunaev said "maybe," but it will be at the Hospital's discretion.

Dunaev testified that during the two days of negotiations for the new contract, Hospital attorney Miller presented the Union's demands to her. According to Dunaev, the Union sought a 401(k) plan in which the Respondent would administer the plan and contribute its own money to the plan in addition to the employees' contributions to the plan. Dunaev told Miller that that the Employer would hire a company to administer the plan and that it would withhold employee wages as contributions to the plan. However, she told Miller that the Employer would not make any deposits of its own money to the plan.

Dr. Lipsky corroborated Dunaev's testimony. He stated that Twomey asked him if the Hospital would contribute to an employee pension plan. He replied that the Hospital had just agreed to a 2% annual raise and it would not contribute to a pension plan. Twomey asked if the Hospital would finance the administration of the plan, estimated to be $15,000 to $20,000 per year and Dr. Lipsky agreed.

In contrast, Twomey testified that an agreement was reached in which the Employer would establish a defined contribution pension plan and would pay on an annual basis a 2% direct contribution on behalf of each employee in the plan. The Union agreed that the Employer would not make a match to the employee's contribution. The Hospital would not pay for the prior year, 2010, which was Liberty's obligation. However, the Employer would make a contribution, by October, 2012, for employees working through calendar year 2011.

Twomey's bargaining notes support her testimony that the Employer agreed to make a 2% contribution toward the 401(k) plan. In further support of the Union's position that the Employer agreed to a 2% contribution, a Clarification Memorandum was distributed at the end of the September 11 session. It stated:

> 38. Pension – Effective – January 1, 2011 – 2% contribution to be paid in 2012 provided employed by MHA on Dec 31, 2011 – Annual thereafter.

Following the conclusion of negotiations, Miller sent Union attorney Richard Loccke a letter confirming and attaching the Clarification Memorandum which included the above provision.

Twomey prepared a "Tentative Agreement between MHA, LLC and HPAE" which stated as follows:

> Article 38: Pension Plan
>
> Pension – Effective – January 1, 2011 – 2% contribution to be paid in 2012 provided employed by MHA on December 31, 2011. Contribution of 2% shall be made annually thereafter.

On September 20, Twomey sent the Tentative Agreement to Miller and asked that he examine the draft that the Union was preparing for a ratification vote, adding that it would be subject to final ratification of the Union membership on September 22.

Miller responded the same day, attaching a revised Tentative Agreement but which left the pension language unchanged. Despite Miller's implicit approval of that language, Dr. Lipsky and Dunaev testified that the language in the Tentative Agreement was not consistent with the Respondent's position during negotiations.

Twomey testified that on September 22, a ratification vote was held at which the Tentative Agreement was explained to the employees who voted to ratify it.

Twomey notified Miller that the contract was ratified, and thereafter, the Respondent prepared the contracts which state in Article 38. Pension Plan:

> All eligible employees may participate in the Meadowlands Hospital Medical Center Pension Plan. The current pension plan levels shall be maintained.
>
> Section 1 401(k) Plan: During the term of this Agreement, regular full-time employees covered by this Agreement are eligible to participate in the Hospital's 401(k) Plan as made available by the Hospital to its non-bargaining unit employees, subject to the same terms, conditions of participation and any changes made thereto. A general description of the plan is contained in the summary plan description to be made available to eligible employees. The Hospital's sole obligation under this Article shall be to select the provider(s) of the plan and the investment funds made available under the Plan and to pay to the trustee of the plan contributions elected by each eligible employee and withheld from that employee's pay as well as any contributions made by the Hospital under the plan. The Hospital may match 401(k) contributions made by employees solely at its discretion.
>
> In the event any dispute involving any claim for benefits under the Plan arises, such dispute will not be subject to the grievance and arbitration provisions of this agreement, but will be subject only to

> the claims provisions in the applicable Plan documents and the terms and conditions contained in such documents will be solely and exclusively controlling.
>
> The Hospital will make a 2% distribution into the 401(k) Plan but there shall be no additional match to employee contribution.

In October, 2012, upon being asked whether the Respondent would be making a 2% contribution to the Plan, Pavisic advised the Union that the Hospital would not make any contributions to those accounts, and on October 8 he advised the Union that the Hospital had been deducting money from employee pay based on their elected payments into the Plan but would not match employee contributions, relying on the contract which stated that it was not required to do so.

The Union filed a grievance stating that the Employer was contractually obligated to make a 2% distribution for all unit employees.. Dunaev explained that the 2% "distribution" provided in the contract was a distribution from employees' pay as opposed to a distribution or contribution from the Employer's own funds. She said that the Employer would administer the process of deducting money from its employees' paychecks and "distribute" it to the administrator of the Plan.

Twomey stated that during her review of the contract she saw nothing incongruous between the terms "contribution" and "distribution" and therefore did not seek a change in the contract language from "distribution" to "contribution."

Twomey further stated that there was no discussion at any time prior to the signing of the contract that "distribution" referred to an employee payment or an employee deduction from her paycheck as opposed to an employer contribution of its own funds.

Dr. Lipsky testified at the Harris arbitration that he told Twomey at the September, 2010 negotiation that the Hospital needed "performance" from its employees, and that "we will give you a 5½ year contract, a 2% annual raise, and we will give you a certain percentage. I think 2% contribution to your 401(k)."

Dr. Lipsky testified here that he "misspoke" when he stated that the Hospital would make a 2% contribution to the 401(k) plan, explaining that he was referring to another issue which was being arbitrated. However, he later testified here that he confused the agreed-upon 2% salary raise with the pension contribution. He also noted that he did not have the contract in front of him when he gave his arbitration testimony.

Discussion

There can be no doubt that employer contributions to a 401(k) plan is a mandatory subject of bargaining. *Lakeside Healthcare Center*, 340 NLRB 397, 399 (2003); *Super Carbide Tools, Inc*., 307 NLRB 1052, 1052 (1992).

In *Britt Metal Processing, Inc.,* 322 NLRB 421, 421 (1996), the Board found that the respondent violated Section 8(a)(5) of the Act by unilaterally reducing its matching contribution amounts to its employees' 401(k) retirement plan without giving the Union notice and an opportunity to bargain about the subject. In *Life Care Centers of America, Inc.,* 340 NLRB 397, 399 (2003), the Board held that the employer failed to pay into the 401(k) accounts the amount set forth in the plan document.

The words in dispute are "contribution" and "distribution." The General Counsel and Union argue that the two words are interchangeable, the contract obligating the Respondent to make a 2% contribution from its own funds into each employee's 401(k) Plan, as set forth in the Tentative Agreement.

While I believe that the facts of this issue is clear, to the extent that parole evidence is necessary to determine what was meant by the word "distribution" I have applied the parol evidence rule:

> While it is true that the parol evidence rule does prohibit the consideration of evidence which varies or contradicts a writing, it does not prohibit the consideration of evidence outside the document itself for the purpose of interpreting the writing. (citation omitted). The parol evidence rule excludes extrinsic evidence concerning a written contract only when the meaning of the document is clear. It does not exclude such evidence when the meaning of certain terms in a document are ambiguous. *Local Union No. 710*, 333 NLRB 1303, 1305 (2001).

Twomey testified that the word "distribution" as opposed to "contribution" was not used during the negotiations that led up to the contract.

The Respondent argues that the contract's requirement that it make a 2% "distribution" to the 401(k) Plan means only that it will distribute, or forward, from the employee's pay the 2% amount elected by the employee to be paid into the Plan. The Respondent contends that it never agreed to make a separate 2% contribution from its funds to the employees' Plan. The Respondent relies, in part, on the contract provision that it will make no additional match to employees' contributions.

The Respondent also relies on the contract's language that the Hospital's sole obligation is to select the provider of the Plan and pay to its trustee "contributions elected by each eligible employee and withheld from that employee's pay as well as any contributions made by the Hospital under the Plan." At the end of the Article the clause reads that the Hospital "will make a 2% distribution into the … Plan but here shall be no additional match to employee contributions."

The clause also states that the Hospital's sole obligation shall be to select the Plan's providers, to pay contributions withheld from employees' pay "as well as any contribution made by the Hospital under the plan." This latter language undermines the Respondent's argument that it was under no obligation to make a contribution or distribution of its own funds to the 401(k) account of employees. It states that it is obligated to make a contribution "by the Hospital."

The Respondent argues that the contract's use of the word "contribution" in two places to require the payment of funds by employees must mean that the contract's later use of the term "distribution" must mean something different – specifically that the Respondent will simply distribute the employees' withheld salary to the plan.

The General Counsel and the Union contend the word "distribution" has the same meaning as the word "contribution." The Respondent argues that its sole obligation is to pay to the Plan the "contributions" made by the employee from her paycheck.

I find that the construction of the contract urged by the General Counsel is the correct one. First, Twomey testified that Dr. Lipsky agreed that the Hospital would make a 2% contribution to the plan for each employee as Liberty had made. When Dr. Lipsky refused to make a match to employees' contributions, that clause, which had been included in the Liberty contract, was not included in the Respondent's contract.

This indicates that Twomey was faithful to Dr. Lipsky's agreement that the Hospital not be required to make a match to employee contributions, but that he had agreed to make a 2% contribution to the Plan for each employee.

Twomey's testimony is supported by Dr. Lipsky's arbitration testimony. Thus as a *quid pro quo* for the Hospital employees' "performance"… "we will give you a 5½ year contract, a 2% annual raise, and we will give you a certain percentage. I think 2% contribution to your 401(k)."

Dr. Lipsky's testimony that he agreed to "give" the 2% contribution was clearly in exchange for the Hospital receiving something of value – the employees' performance. If he was merely distributing the employees' money to the Plan he would not be "giving" anything or receiving anything of value. He would be merely distributing the employees' funds and receiving nothing of value in return.

I cannot credit Dr. Lipsky's explanation that he misspoke. He did not identify the other issue that he was referring to that was being arbitrated. Nor could he have been referring to the 2% salary raise. He had already told the Union in the same breath that he had agreed to give the Union a "2% annual raise." He would not have repeated himself by saying twice in the same sentence that he gave the Union a "2% annual raise."

I accordingly find and conclude that, as alleged, the Respondent failed to continue in effect all the terms and conditions of the RN, Service, and Tech contracts by refusing to make contributions to employees' 401(k) plans. The Respondent violated the contract by modifying it without obtaining the Union's consent.

I also cannot find that the Respondent had a sound arguable basis for believing that the contract allowed such a modification. I find that it had agreed to make the contributions as demonstrated by the testimony of Dr. Lipsky and by documentary evidence, but then refused to honor its agreement. The parties' actual intent underlying the contractual language is clear. The Respondent agreed to make a 2% contribution to each employee's 401(k) account as Liberty had done. The Respondent refused only to make an additional match to employees' contributions.

H. The Alleged Failure to Offer Bumping and Recall Rights to Laid Off Employees; Changing the Contracts' Bumping Provisions

The complaint alleges that since about February, 2012, the Respondent failed to continue in effect all the terms and conditions of the RN, Service, and Tech contracts by failing to offer bumping and recall rights to laid off employees. The complaint further alleges that since about November 16, 2012, the Respondent failed to continue in effect all the terms and conditions of those contracts by changing the bumping provisions of those contracts.

1. The Layoff/Bumping Procedure

Section 5.4 of the RN contract, as relevant, states as follows:

B. In case of a layoff in a particular patient care area (unit), layoff shall be by seniority in the patient care area (unit) to be affected, with the employee with the least seniority in the particular patient care area (unit) being laid off first.

C. In case of a layoff, the following procedure shall be applied to an affected employee in order of seniority:

1. The Hospital will first seek volunteers in the affected unit. If there are no volunteers, then,
2. The most senior affected employee shall be offered a choice of any vacant position. (This continues through each affected employee in seniority order).
3. If the employee refuses a vacant comparable same shift, classification (i.e. Part-time or Full-time, job title, and rate of pay) position, s/he will be laid off.
4. After all vacancies have been filled, an employee may bump as follows:

a) The most senior employee may bump the least senior employee from a list of the least senior employees on the same shift and in the same classification (i.e. full-time or part-time). The list will be equal in number to the number of employees scheduled to be laid off on that shift. The employee may only bump into a position where he/she is fully qualified to perform the job. If there is no less senior employee on the same shift and in the same classification who the employee can bump, then,

b) Viewing the employees on the other shifts as one group, the most senior employee may bump the least senior employee in this group in the same job title.

c) If the employee chooses not to bump an employee on another shift the employee may bump the least senior part-time employee from his/her same shift, so long as the part-time employee being bumped has less seniority pursuant to Section 5.1(A) unless the employee seeking to bump has 10 years of full-time service. For purposes of this entire provision per diem seniority is not considered.

d) A part-time employee can only bump a part-time employee.

e) An employee who is bumped by a more senior employee shall be allowed to bump in the same manner described above, however the employee subsequently bumped will have no bumping rights.

f) All the above continues through each affected employee in seniority order.

> g) A laid off employee is eligible to work in the per diem float pool.

2. The Recall Procedure

Section 5 of the RN contract provides for recall as follows:

> Employees in a recall status will have first preference for any vacant position for which they are fully qualified. Employees will be recalled in reverse order in which they were laid off. If an employee takes a position other than her original position, the employee shall have the option of returning to their original position if it becomes available.

All three contracts provide as follows:

> Employment shall be deemed terminated and seniority shall be deemed broken when an employee is laid off for a continuous period of 6 months.

a. The RNs Who Were Laid Off

The General Counsel alleges that laid off RNs Jane Patel, Elizabeth Purvis, Helen Harris, Rona Lowy, Gloria Huggins, Josephine Brimgas, Shirley Bastien-George, Anna Hsue, and Lilbeth Pradhanang were eligible to have bumped other employees but were not advised of their bumping rights.

As set forth above, the contract states that the layoff and bumping procedure "shall be applied to an affected employee in order of seniority… the most senior employee may bump the least senior employee…."

On January 24, 2012, Dudsak asked Pavisic if anyone had been advised of their bumping rights. He replied that employees had 48 hours to use their bumping rights but the Hospital had not offered another position to any of the workers. Dudsak testified that when employees were laid off they were not offered any bumping rights and were not told of a position into which they could bump.

Chief Nursing Officer Karsos stated that no personnel files that she examined contained any documents sent to the laid off nurses confirming that they had been offered bumping rights. Nor did she send letters to any laid off nurse advising that a position was available if she wanted to return to work.

It was stipulated that the only documents sent by the Respondent to employees offering to recall them from layoff or offers by the Hospital to permit unit employees to bump into positions held by another employee consist of the following 10 day notices of layoff sent to Lyudmyla Bendas, Maribel Collazo, Josephine Sarabosing, Melissa Vieia, Mria Bambico, Bernice Ogori:

> This letter is to inform you that the Inpatient Rehabilitation Unit will temporarily close effective November 1, 2012. As a result of the closing of the unit, all employees in the unit are being temporarily laid off. All affected employees will have their seniority rights honored pursuant to the collective bargaining agreement. If you

> wish to volunteer for this layoff, and elect to waive your bumping rights, please contact the Human Resource Department. Your lay off will be effective not less than 10 days from the date of this letter.

On April 16, 2012, Jeong Ro was simply notified that she was being laid off due to a reduced census, and on May 24, she was advised that an RN position was available in the Detox unit. She was asked to contact Pavisic if she was interested in the position.

Dudsak testified that she asked Pavisic which employees bumped others. She did not recall receiving an answer, but Pavisic replied on January 26, 2012, asking "per our last conversation please provide me with list a of employees who you believe should exercise their bumping rights." Dudsak stated that she received a bumping list on February 1, 2012.

Human resources director Garrity testified that when the Hospital's board of directors decides that a certain number of employees must be laid off in a particular department, the board informs the department manager to lay off that number of workers. The department managers decide who will be laid off. Garrity advised the department managers that they should discuss with her the reasons for the lay off so that the collective-bargaining agreement may be followed - that layoffs be in reverse order of seniority.

Garrity stated that the human resources department does not keep a list of employees who are eligible for recall. Under the contract, employees are eligible for recall six months after their layoff. If there is a vacancy, instead of hiring someone outside the Hospital, she recalls an employee who had been laid off less than six months before, for a position that she is fully qualified for within the same classification.

Garrity noted that before sending layoff notices to employees she does not seek volunteers from the affected departments to accept a voluntary layoff. Nor does she direct the department directors to seek volunteers for that purpose. Garrity stated that she told some employees when she laid them off that they could remain employed as per diem workers if they wished.

Karsos testified that at the time of the layoff caused by the closure of the PACU and the Rehabilitation unit, she looked at all available positions to see if there were any positions the employees could bump into. She also searched for available vacancies in various units.

Karsos testified that the most senior nurse is given the opportunity to bump the least senior nurse within her shift and within the same job classification which would be part-time or full-time as long as she is fully qualified to perform the job.

If no one fit that criteria, the employee is allowed to bump the least senior employee in any of the off-shifts (11am to 7pm or 7pm to 7 am) within the same job title as long as she is fully qualified to perform that job. If the employee chooses not to bump, she is given the opportunity to bump the least senior part-time employee within her own shift as long as she is fully qualified to perform the duties for that position.

b. The Decision as to Whether Nurses were "Fully Qualified" to Perform the Job

As set forth below, there were positions into which the laid off RNs could have bumped into by virtue of their seniority. However, according to the contract, the nurse "may only bump into a position where he/she is fully qualified to perform the job."

In determining whether an employee was fully qualified to perform the job into which she was eligible to bump, the Employer did not consider her experience prior to her hire at the Hospital because it did not have access to the employee's personnel files at her prior jobs.

The term "fully qualified" is not defined in the contract. Karsos stated that "fully qualified" means that the nurse can literally move into that position immediately and be able to perform all the responsibilities that are required, enabling her to take a patient load and be competent in performing all the responsibilities required for patients in that unit. Karsos further stated that "fully qualified" means that the nurse can work independently, by herself. She stated, as an example, that a newly hired nurse would be fully qualified to work in the ICU if she had current or recent experience in the ICU within the past one to three years. If her experience was less recent, she would need additional training.

Karsos testified as to specific departments the nurse could have bumped into. As noted above, according to the contract, the nurse must have been "fully qualified" to perform the job she would bump into.

Karsos testified, as outlined below, that the nurses who were not offered bumping rights were not "fully qualified" for the available positions because they lacked the necessary experience in those units which would enable them to move into that position immediately and be able to perform all the responsibilities that are required, including working independently. In each case, Karsos explained why the nurse was not "fully qualified" to work in the position to which she could bump.

She testified to the specific medical expertise required of the nurse in various units, describing in detail why the nurse was not fully qualified to perform the job she was entitled, by virtue of her seniority, to bump into.

Thus, Karsos stated that L&D, a specialty area, is much more complex than the med-surg unit. She noted that that unit was "high intensity," requiring the nurse to have at least three months' training in that unit to amass "minimal competency," but it would take "months" for her to become fully qualified to function independently.

The ICU requires additional training above and beyond that of a med-surg nurse. The nurse must know specific treatments for caring for very ill patients and must be trained in various aspects of pharmacology. She estimated that the nurse needed a minimum of four weeks of training, but would require several months to be fully qualified to work in the ICU.

A nurse working in the Pediatrics department would not be fully qualified with three months' training because of the difference in treatment of newborns and babies as compared to adults.

A PACU nurse cares for patients in post-anesthesia. The position involves caring for patients on a ventilator in a more critical care environment involving different medications and

technology. Karsos estimated that it would take a nurse three to four weeks to become fully qualified to work there.

The ER requires skills related to critical care. The nurse must be knowledgeable in the triage process. She would be administering certain medications that she had not used as a med-surg nurse. She needs familiarity with ventilators and would be caring for pediatric and geriatric patients. Karsos estimated that the nurse needed three to four weeks of training to work in the ER, but several months for her to be fully qualified to work independently there.

Karsos testified that the OR is very specialized. The nurse must learn hundreds of procedures performed by different surgeons. Because of the nature of surgery the nurse would need at least six months' training to function "somewhat independently."

Karsos stated that because a nurse may float from one unit to another does not mean that she is fully qualified to work in the unit to which she floated. She would not have had the required training, experience and education that would make her fully qualified to handle any situation independently. For example, a nurse in the nursery department would not be fully qualified to work in the pediatrics department because she is experienced only in the care of newborns. Working in Pediatrics would require her to be fully qualified to care for patients from birth to age 21. However, according to Karsos, a nurse with experience in another hospital's ICU would be fully qualified to work in the Hospital's ICU if her experience was common to both departments even though she would have to complete another orientation.

It is critical to note that Karsos testified that the human resources department decided whether the employee was qualified to perform the job, based on the nurse's experience with the Employer, to bump another employee or was eligible for recall. Karsos stated that she did not speak to the nurse prior to her lay off regarding her qualifications before the decision was made as to whether she could bump another employee. Rather, Karsos spoke to the nurse after the decision was made.

It would appear that Karsos, the chief nursing officer, would be the most qualified person to have decided, in the first instance, whether a specific nurse was fully qualified to perform the job she could bump into. However, according to Karsos' testimony, the human resources department made the decisions as to who was fully qualified to perform the job based on the nurse's experience in the Hospital. There was no evidence that the human resources department applied the "fully qualified" criteria in its decision to not offer nurses an opportunity to bump into other positions. Nor is there evidence that Karsos discussed that criteria with the human resources department before it decided not to offer recall to the laid off nurses.

Neither human resources director Garrity nor any other human resources department agent testified as to why that administrative department and not a nursing department official made those important decisions. Those decisions must have included a detailed evaluation of the professional nurse's qualifications and experience, taking into account the numerous medical procedures and duties she performed. Nor was there any testimony by the human resources department as to the specifics concerning why each nurse was not deemed to be fully qualified to perform the job she was entitled to by virtue of her seniority. Nor was there evidence that the human resources department was qualified to determine that a specific nurse, taking into consideration in some cases decades of experience at the facility, was not fully qualified to perform the duties of a specific position to which she was entitled, by virtue of her seniority.

In addition, there was no evidence of any notice, oral or written, given to any laid off nurse stating or giving the reason why they were deemed not fully qualified to perform the job to which they were entitled. In this regard it must be noted that Union agent Carlton Levine stated that he was never told by the Employer that an employee had to have worked at any specific position in order to be qualified to bump into that position.

There is no evidence from the human resources decision makers as to why professional nurses having years and sometimes decades of professional nursing experience at this facility were deemed not fully qualified to perform the jobs to which they were entitled by virtue of their seniority. There was no testimony as to why specific nurses were not fully qualified to perform those jobs. Instead, we have only a post-decision justification by chief nursing official Karsos as to why those decisions may have been made. We do not have evidence from the decision makers as to why, in fact, those decisions were made.

The failure to call the decisionmakers to explain why the nurses were not recalled gives rise to an adverse inference, which I find appropriate to draw, that their testimony, if offered, would not have been favorable to the Respondent's case. *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 6 (2016); *National Association of Government Employees*, 327 NLRB 676, 699 (1999); *United Parcel Services of Ohio*, 321 NLRB 300, 308-309 (1996); *Ready Mixed Concrete*, 317 NLRB 1140, 1143, fn. 16 (1995); *Dorn's Transportation*, 168 NLRB 457, 460 (1967) (failure of the decisionmaker to testify "is damaging beyond repair"); *The Southern New England Telephone Co*., 356 NLRB No. 118 (2011) (failure to call decisionmaker warrants an adverse inference).

Karsos' testimony that an RN would need at least six months' training to function "somewhat independently" in the OR is severely undermined by the fact that RN interns Moser, Carullo and Wielenga were hired as staff RNs in the OR immediately following the completion of their internship.

Accordingly, these three nurse interns were apparently deemed "fully qualified" to be placed in the OR as regular staff nurses with their only experience being their internship training. They also worked as per diem nurses while engaged in the internship program.

In addition, Karsos' testimony that even experienced nurses needed at least six months' training in the OR to be deemed "fully qualified" supports a finding that nurses with decades of experience as RNs could have been given the opportunity to be trained for that period of time in units requiring such experience.

I acknowledge that Karsos testified that the nurses who completed the internship program and were hired were not qualified to function independently. However, her testimony is not entitled to great weight. Thus, she conceded that interns asked to be hired and they were hired, although "honestly, I don't know why some of the Interns were in the positions that they were….If there was a full-time position, they would apply for it; they would receive additional training….the Manager decided to hire them as per-diem; that certainly would not have been my choice. A per-diem is a nurse who has not three weeks or four weeks or six weeks of training. It is a nurse that has two--three years of experience that can function as per-diem, like an agency nurse."

Nevertheless, Karsos conceded that interns were hired as staff nurses and per diem nurses the day after their internship ended, but sought to undermine the decision-making that resulted in their hire, stating that she "wasn't controlling the hiring process to that extent."

Karsos stated that if she had a staff position, she "would have hired a new graduate and just trained them into the position." She also stated that following their internship the intern would have to be "oriented in the position just like any new hire." The question thus arises if the experienced nurses who were eligible to bump and be recalled were not deemed fully qualified why were they not "trained into the position."

Karsos stated that per diem nurses were "ready to go." She noted that at the beginning of the orientation program the nurses were not ready to be hired as per diem nurses. However, she conceded that at the conclusion of the program "it happened many times" that the interns were hired as per diem nurses.

Karsos then opined that the interns hired as per diem nurses were not qualified to function independently, noting that a nurse with three to six weeks training cannot be compared with a per diem nurse who had two to three years of training.

Thus, she apparently ceded the hire of the interns to the department managers. She stated that interns asked for positions and they were hired, although she would not have hired them because she believed that they were not qualified for the positions they were hired for. Nevertheless, apparently the department managers believed that the graduated interns were fully qualified for the positions they occupied.

Moser, Carullo and Wielenga are significant cases in point. All three completed the six-month internship program and were hired as full-time staff nurses in the OR. None of them worked continuously in the OR during their internship.

In addition and most significantly, Carullo and Moser performed work as regular per diem nurses during their internship. As set forth above, human resource manager Kunish offered interns Carullo and Moser extra, paid evening shifts as an "incentive" and they performed such work for one or two paid shifts per week for about three weeks. They earned the regular per diem rate for such work. Significantly, director of nurses Ortiz testified that Karsos, the chief nursing officer, approved such per diem work.

Karsos ended their per diem work, telling Ortiz that their work at two different pay rates, daytime as interns and evening as per diems was difficult for the payroll department to process. The testimony of Carullo and Moser is more believable concerning the reason their per diem work was ended. Karsos and Ortiz told them that if they worked as per diem nurses they would be considered as staff RNs and would be included in the Union which was an "issue." Karsos conceded that there "was talk" to that effect.

The most significant aspect of the cessation of their work as per diems is that Karsos did not tell Ortiz that Carullo and Moser were not qualified to perform work as per diems because they were interns. Rather, she told Ortiz that it would be a problem for the payroll department to process two different salary rates.

Accordingly, Karsos' testimony that nurses with decades of experience were not fully qualified to bump into the various departments cannot be given great weight considering the fact that she authorized interns Carullo and Moser to work as per diem nurses during their internship.

Moser's internship began on May 2, 2011 and ended on November 5, 2011. Her status was changed to an OR nurse on November 6, 2011. She stated that during her internship program she trained for one week in the OR and worked as a circulating nurse, scrubbed in and assisted the surgeon there. She worked on her own for about three months, from September, to

November 5, 2011, when she completed the program. She stated that toward the end of the internship she functioned as an OR nurse, handling all types of operations independently.

Thus, the three nurses hired in the OR immediately following the completion of their internship were apparently considered by the hiring manager to be fully qualified to work there. Even assuming, according to Karsos, that they needed additional training to be fully qualified, such training could also have been given to the nurses who were entitled to bump into positions there and those who were entitled to be recalled because of their seniority. This is especially the case since those nurses, in some cases, had decades of experience as professional nurses in this facility. Their training would certainly have been enhanced by the fact that they had functioned as RNs for so many years.

In addition, nurses discussed below "floated" to various units where they functioned as nurses in those departments, apparently without incident. Yet those nurses were not deemed by Karsos to be fully qualified to bump into those units or be recalled to those units.

Those nurses in some cases had been employed for decades in this facility. I cannot accept Karsos' testimony that simply because a nurse may have floated from one unit to another does not mean that she is fully qualified to work in the unit to which she floated. Her testimony that such a nurse would not have had the required training, experience and education that would make her fully qualified to handle any situation independently is undermined by the fact that the nurse who floated and worked in that unit must have been deemed to have been fully qualified to work as a professional nurse in the performance of her duties in the unit in which she worked as a float nurse.

In addition, as set forth above, 54 nurse interns were hired by the Respondent as staff RNs or per diem nurses immediately after their internship ended.

For these and other reasons detailed below I cannot credit Karsos' testimony, as outlined below, that certain nurses were not fully qualified to perform the jobs to which they were entitled.

In my discussion, below, of the individual nurses' qualifications to bump into other positions, it is not necessary to repeat my reasons, set forth above, that persuasive evidence was not presented that the human resources department, in fact, determined that the nurses were not "fully qualified" to bump into available positions.

c. The Determination of Positions Available for Bumping and Recall

I received in evidence General Counsel exhibits prepared by Union agent Boydston.[6] The exhibit sets forth the names, positions, and dates of hire and layoff of nurses, technical employees and service employees who the General Counsel argues were eligible to bump into positions and be recalled into positions.

[6] G.C. Exhibits 157-163.

The exhibits also set forth under those names the names, positions and dates of hire of those employees who the General Counsel argues should have been bumped by the employees above their names, or whose positions should have been relinquished by the recall of the employees listed above their names.

The Respondent did not dispute the validity of the documents with one minor exception concerning whether one employee who was laid off was actually terminated. It examined its witnesses using those documents.

The Registered Nurses

Jane Patel

Jane Patel was laid off on April 12, 2012 from 3 West where she worked in the telemetry unit for 25 to 30 years. At the time of her layoff she worked from 7:00 am to 7:00 pm. She worked in a med/surg unit and then "floated" to med/surg, rehab and ICU.

Patel testified that she received a layoff notice from Donna Ortiz on April 16, 2012. She first stated that she was not told of any bumping rights she may have had, but then testified that Ortiz said that "you can bump" but did not tell her to what position she could bump. Patel did not reply to Ortiz' comment. She also denied speaking with Karsos regarding her bumping rights.

Karsos testified that Patel, who started work in the med-surg unit and then became a float nurse in all units, worked in the telemetry unit for many years. She stated that Patel would not have been "fully qualified" to work in various units in the Hospital if she had the opportunity to bump, but nevertheless was offered an opportunity to bump two employees, Alice Oguku and Luydmyla Bendas, on either the 7:00 pm to 7:00 am or 3:00 pm to 11:00 pm shift but declined to work on either shift.

Karsos testified that Patel was not fully qualified to bump into available positions in the PACU, ER, OR, ICU, pediatrics or L&D.

She stated that Patel could have bumped into a position in 3 West but was not permitted to do so because it was occupied by Joon Lee, an intern. Karsos explained that Lee's position was not "really … a position" to which she could be placed since the internship was a "training program." Accordingly, Patel was not bumped into Lee's position.

I find that Patel could have bumped into the available positions. She had nearly three decades of professional nursing experience at the facility and had previously worked in the ICU where a position was available.

For the reasons set forth above, and because of her previous experience in ICU, Patel should have been able to bump into a position in the ICU and given training there if needed.

I find that Patel should have been permitted to bump into Lee's position. I cannot agree that Lee's position was "not really a position" because he was an intern. Regardless of whether Lee was an intern he performed work on 3 West which Patel could have performed.

The evidence also establishes that Patel, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Patel could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Patel was laid off.

Elizabeth Purvis

Elizabeth Purvis had been employed in the facility since 1977. She worked full-time on the day shift in the ICU, and then the endoscopy unit, and while in that unit also worked in med-surg and PACU. She stated that she worked on nearly every floor in the Hospital during her long service. She floated to the ER and same day surgery units.

Purvis was laid off on April 23, 2012, being told by Pavisic and Kunish that her layoff was due to a low patient census. She stated that neither management official mentioned her bumping rights. She told them that she wanted to apply for a per diem position and was told that she could work as a per diem. Purvis gave them a letter of intent that day and she worked the next day as a per diem. Thereafter, she was not offered any other per diem shift and had no contact thereafter from the Respondent.

Karsos testified that Purvis was not fully qualified to work in the PACU, the ER, OR, L&D, ICU or Pediatrics. Karsos stated that she did not have the specific training and expertise to work in those departments but conceded that she would only require three to four weeks of training in med-surg to be qualified to work in that department.

Although she could have bumped intern Joon Lee, Karsos considered his position not "really" a position. Accordingly Karsos concluded that Purvis could not have been recalled to the position occupied by Lee.

I find that Purvis who worked for more than three decades at the facility, was eligible to bump into available positions in the ICU and ER where she had worked during her long career. The three or four week training period specified by Karsos was sufficient to bring her to the current standards required.

She also could have bumped into intern Lee's position for the same reasons given above.

The evidence also establishes that Purvis, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was.

The evidence also establishes that Purvis could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Purvis was laid off.

Helen Harris

Helen Harris began work in the facility in June, 1993. She attended an OR training course for about six months beginning with classroom training for one or two months and then she was assigned to a preceptor for the rest of the six month program. She worked in the endoscopy department and also in the step-down unit and the PACU.

Two weeks before her layoff on April 23, 2012, she was told by Kunish and Pavisic that the census was low and that she had to be laid off. Kunish said nothing to her about bumping rights. Harris offered to work as a per diem employee in the endoscopy or same day surgery

departments. Kunish said that she would put Harris' name on the "list." However, thereafter, Harris was not called for a position as a per diem employee. Nor was she offered recall.

Karsos testified that Harris was not fully qualified to work in various departments in the Hospital and would need three to four weeks of training in the med-surg unit before she was qualified to work there. She further stated that there were no less senior employees than her in same day surgery, noting that employees Jessica Intirago, Iryna Shlapakova and Erik Wielenga were in the OR, not in the same say surgery unit.

Karsos further stated that Harris was not fully qualified to be recalled to positions in L&D, the only position which was available. Further, although a position was available in 3 West, it was occupied by intern Joon Lee and, according to Karsos, since it was not really a position, she could not be recalled to work in his stead.

I find that Harris having two decades of nursing experience in the facility could have bumped into available positions. If training was necessary she could have been trained. In addition, she could have bumped into the position occupied intern Lee, for the reasons set forth above.

The evidence also establishes that Harris, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Harris could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Harris was laid off.

Rona Lowy

Rona Lowy was employed at the facility for 16 years and worked predominantly in the Rehab unit. She also "floated" to med/surg, telemetry, and post-partum units during the last part of her tenure. She denied speaking to Karsos about bumping rights prior to her layoff in 2012.

Her first layoff notice was rescinded. When she was given a second layoff notice, she spoke with Pavisic regarding opportunities to bump to other units. Pavisic told her that the only position available was a 3:00 pm to 11:00 pm evening shift. She told him that, as an Orthodox Jew, she could not work between sundown on Friday and sundown on Saturday.

She offered to work, as she had worked during her career, Saturday nights and Sundays in lieu of working every other Saturday and Sunday. Pavisic replied that the Union contract required her to work specific shifts and that the Hospital could not deviate from that. She told Pavisic that she had arranged her work schedule in the past to accommodate her religious observance. Pavisic offered her a per diem position which she accepted.

Karsos testified that, as a Rehab nurse, Lowy was not qualified to work in PACU, ER, OR, L&D, ICU or Pediatrics. However, according to Karsos, she was fully qualified to work in the med-surg and telemetry units. Karsos stated that she offered that Lowy bump into evening shifts but Lowy refused, wishing to work on the day shift.

Karsos further testified that she offered Lowy the opportunity to bump Alice Oguku on the 7:00 pm to 7:00 am shift and Lyudmyla Bendas on the 3:00 pm to 11:00 pm shift, both on 3

West, but Lowy rejected both because she wanted to work 7:00 am to 3:00 pm or 7:00 am to 7:00 pm. However, according to Karsos, there were no less senior RNs who worked either shift.

In contrast, Lowy's testimony, which I credit, was that neither Karsos nor any other management person spoke to her about bumping rights, and, as set forth above, she had worked the evening 7:00 pm to 7:00 am shift, and on those occasions on a Saturday night in which she could not arrive on time due to the Sabbath, she made arrangements with her co-workers to cover for her until she arrived. She further testified that accommodations in behalf of a co-worker who was a Seventh-Day Adventist had been made by the Hospital.

Karsos testified that Lowy could be recalled to replace Joon Lee, the intern in 3 West. However, as an intern, according to Karsos, he did not occupy a "position" to which Lowy could be placed.

I find that Lowy's extensive experience in various hospital departments qualified her to bump into or to be recalled to those other units. Further, she could have bumped into or have been recalled to intern Lee's position, as set forth above.

The evidence also establishes that Lowy, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Lowy could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Lowy was laid off.

Gloria Huggins

Nurse Gloria Huggins' hire date was December 7, 2010. She was employed for six years at the facility. She testified that she worked primarily in the pulmonary unit, but also floated in the telemetry, Rehab and med/surg departments. When she was given a layoff notice by her manager and Pavisic in 2012 she was not told that she could bump to another unit. She further stated that she never spoke with Karsos concerning her ability to bump into another unit and was never given the option of bumping to another unit.

Karsos testified that Huggins was not fully qualified to bump employees in PACU, ER, OR, L&D, ICU and Pediatrics.

Karsos testified that Huggins could have bumped Alice Oguku on the 7:00 pm to 7:00 am shift, but further stated that she had no personal knowledge that Huggins was given an opportunity to do so. It must be noted that Huggins credibly testified that if she was told of that opening she would have accepted it, as she had worked that shift in the past.

Inasmuch as Karsos conceded that Huggins could have bumped Oguku but there was no evidence that she was offered that option, I find that Huggins should have bumped Oguku.

The evidence also establishes that Huggins whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Huggins could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Aturozi, or Lyubiv Zhuravkov, all of whom were hired after she was laid off.

Josephine Brimgas

Josephine Brimgas worked in the facility for about ten years. She worked primarily in the pulmonary unit and floated to the med/surg, telemetry and the Rehab units during her tenure. She denied that Karsos spoke to her concerning her ability to bump into another unit.

However, after Brimgas received her layoff letter on February 7, 2012, she was told by Pavisic and supervisor Betty Hayden that if she wanted, she could bump to a shift from 3:00 pm to 11:00 pm in the Rehab unit. Her regular shift had been 7:00 am to 7:00 pm. She replied "I'm going to try." She stated that she accepted the offer - "I like it, I'm going to work it."

Thereafter, according to Brimgas, she never received any follow-up communication from the Hospital concerning the offer of the new position. She stated that she called Pavisic and believed that she asked him whether the job was available for her. She did not recall his reply.

Karsos testified that Brimgas was not fully qualified to work in PACU, ER, OR L&D or the pediatric unit, but was qualified to work in the telemetry and med-surg units. She further stated that Brimgas was offered the opportunity to work on the 7:00 am to 7:00 pm shift but declined because she did not wish to work the night shift. However, I credit Brimgas' testimony that she did not speak to Karsos regarding bumping into another position.

Karsos testified that Brimgas could be recalled to a position in L&D, but was not fully qualified to work in that unit. Karsos also stated that she could have been recalled to work on 3 West but that position was occupied by intern Lee who, according to Karsos, did not actually occupy a position because of his status as an intern in the training program.

For the reasons set forth above, Brimgas should have been recalled to work in L&D and bumped into the position occupied by Lee.

The evidence also establishes that Brimgas, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes Brimgas could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Aturozi, or Lyubiv Zhuravkov, all of whom were hired after she was laid off.

Shirley Bastien-Georges

Nurse Shirley Bastien-Georges' hire date was December 7, 2010. She was employed in the respiratory ventilation unit when she was laid off. She stated that her manager gave her a note stating that she was laid off, asking what her plans were. Bastien-Georges replied that she had a part-time job, and asked whether the layoff was effective immediately. She was told that it was but the next day her manager called and said that her layoff would be effective at a later date. Bastien-Georges refused the offer to return.

Bastien-George denied that Karsos or her manager told her that she could bump into another position or unit upon her layoff.

Karsos testified that Bastien-Georges resigned before her final layoff date. An email dated January 25, 2012 from a supervisor to Karsos stated that Bastien-Georges notified the supervisor that day that she had another job and would not be returning to work. Karsos further testified that Bastien-Georges was not fully qualified to work in certain other units of the Hospital but was qualified to work in the telemetry and med-surg units.

Had Bastien-Georges been advised of her bumping rights before she resigned, it is possible that she may not have resigned. Her decision to resign was apparently made in the absence of an opportunity to bump into another position. In this case the burden must be placed on the Respondent for not advising her of her bumping rights.

The evidence establishes that Bastien-Georges was laid off on January 22, 2012. The records establish that she could have been bumped three nurses, Lyudmyla Bendas, Marina Belaya, and Alice Oguku who were employed in the med/surg department at the time that she was laid off and were less senior than her. The record also shows that she could have been recalled to replace nurses Joon Lee and Bianca Taurozzi, nurses who were less senior to her and worked in 3 West and L&D, respectively.

The record indicates that Bastien-George could have bumped the above nurses. However, since there was no evidence that she was advised of her bumping rights before she resigned, I find that she was unlawfully denied the opportunity to bump into those positions.

The record also establishes that Bastien-Georges could have bumped into positions occupied by various employees in 3 West, ER, OR, L&D, Pediatrics and PACU, all of whom had been hired after she was hired.

The evidence establishes that Bastien-Georges who was laid off on January 22, 2012 could have been recalled to replace Joon Lee a 3 West nurse and Bianca Taurozzi who worked in L&D, both of whom were hired after she was laid off.

Anna Hsue

Anna Hsue was employed at the facility for more than 30 years. She testified that she worked in the telemetry unit when she was laid off. She had also worked in med/surg, ICU, Pediatrics, post-partum, and L&D.

Hsue denied that following her layoff, Karsos or Donna Ortiz spoke to her regarding her ability to bump into other positions, and she was not offered another job in another unit. She denied telling them that she did not want to work in another unit.

Hsue further testified that when she worked as a charge nurse her secretary and others in her unit were laid off. Others were also laid off in her unit on two other occasions. She stated that at the time of those earlier layoffs she told Donna Ortiz to put her name “on the list” of those scheduled to be laid off. Her reason for doing so was that the layoff of so many employees caused her work load to increase to a high level, making it difficult for her to complete her responsibilities. She believed that her nursing license was at risk due to her increased work load. Hsue’s personnel file states that she was laid off on June 13, 2011 due to the closure of 3 Center.

Ortiz testified that after the first round of layoffs in about March or April, 2011, Hsue told her that she wanted to be laid off. Ortiz reported Hsue’s request to Karsos and Kunish, and told

them that if there was another round of layoffs, Hsue was interested in being laid off. Hsue was laid off in the second round of layoffs.

Karsos testified that when a layoff in Hsue's unit was announced, Hsue told her that she planned on retiring and would give up her position so that another person could occupy it. Karsos stated that she chose a voluntary layoff. As noted above, Hsue denied speaking to Karsos about her layoff. Karsos testified that Hsue was not fully qualified to occupy other positions in various other units.

The evidence is clear that Hsue was not advised of her bumping rights at the times that she was notified of her layoff. Her decision to accept a voluntary layoff may have been different had she been properly advised of her bumping rights.

According to the records, Hsue was laid off on June 13, 2011. She worked in L&D. She could have bumped Deanyira Zarza who had been hired on May 2, 2011 and was working in L&D at the time of Hsue's layoff.

I accordingly find that Hsue was denied the opportunity to bump into that position.

The record also establishes that Hsue could have bumped into positions occupied by various employees in the ER, OR, L&D, and PACU, all of whom had been hired after she was hired.

The record also establishes that Hsue whose position in 3 West was eliminated on June 13, 2011, could have been recalled to work to replace Lyudmyla Bendas, Marina Belaya, Alice Oguku, Mabis Abby and Nicole Cabrera who were hired after she was laid off, and who worked in 3 West. Further, she could have been recalled to replace Lauren Terhune and Menard Tchatchou-Tchoubia, who worked in L&D and ICU, respectively, units where Hsue had worked.

Lilbeth Pradhanang

RN Lilbeth Pradhanang was employed at the facility for 28 years, working in telemetry, PACU and ICU. In April, 2012, she was working the 7:00 am to 7:00 pm shift and was told by Kunish that she was being laid off due to a reduction in the hospital's census. She asked about her bumping rights, and Karsos told her that she could bump an employee who worked from 11:00 pm to 7:00 am in the ICU. Pradhanang declined. At that time she was not working at night and preferred a position in the daytime. She was not offered an opportunity to bump into any other position.

Karsos stated that other positions available for bumping were in ER, OR, ICU, L&D, Pediatrics and 3 West. Karsos stated that she was not fully qualified to work in those units, but she was fully qualified to bump into a position occupied by RN Fernando Carbillas in PACU.

However, Karsos testified that Pradhanang was given an opportunity to bump Carbillas but refused to bump one of her peers. In addition, according to Karsos, Pradhanang was given the opportunity to bump Lyudmyla Bendas who worked 3:00 pm to 11:00 pm, but she declined, and was also afforded the possibility of bumping into the evening shifts of Alice Oguku and Menard Tchatchou-Tchoubia who worked on that shift. However, according to Karsos, Pradhanang said that she did not want to work the evening shift.

Karsos stated that Pradhanang could have bumped intern Joon Lee but was not given that opportunity.

Later that month, Pradhanang was told by Kunish that she heard that she wanted to work as a per diem. Pradhanang agreed and was told by Karsos to get her badge and hospital identification from the human resources department.

Pradhanang went to the HR department where she was asked to see the director who said that she would complete the "transfer" form. A few days later the HR department informed her that she was needed at work but that she was no longer listed as an employee. She called Kunish who said that she had to check with HR. Kunish never called Pradhanang after that. Accordingly, Pradhanang did not work at the Respondent following her layoff, nor was she recalled to work.

I credit the testimony of Pradhanang that she was not offered the opportunity to bump other employees. I further find that she could have bumped into other positions.

The evidence also establishes that Pradhanang, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Pradhanang could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Pradhanang was laid off.

Diane Reilly

Reilly did not testify. At the time of her layoff on February 15, 2012, Reilly was a part-time nursery department nurse. The positions available for bumping included the PACU, ER, OR, ICU, pediatrics, L&D and 3 West.

Karsos testified that she was not fully qualified to occupy any of those positions. In any event, they were full-time employees. A part-time worker could not bump into a full-time position. However, Carbillas who worked in PACU was also part-time but, according to Karsos, Reilly was not fully qualified to work in PACU.

For the reasons set forth above, I find that Reilly could have bumped into or could have been recalled to the position in PACU.

The evidence also establishes that Reilly, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Reilly could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Aturozi, or Lyubiv Zhuravkov, all of whom were hired after she was laid off.

Margaret Kamihanda

Kamihanda did not testify. She was a per diem night shift employee who worked in the Rehabilitation unit. She was laid off on April 12, 2012.

On the day of her layoff she filed an application for disability leave. Thereafter, according to Karsos, Kamihanda did not notify the Respondent of her ability to return to work.

Karsos testified that Kamihanda was not fully qualified to work in available positions in PACU, ER, OR, ICU, L&D and Pediatrics. Karsos stated that Kamihanda was not recalled because she did not notify the Respondent that she was available to work in view of her disability status, and could not have been recalled to Joon Lee's position because he was an RN intern and his work was not really in a position.

I find that Kamihanda could have been recalled to the position occupied by Joon Lee. I further find that for the reasons set forth above, she was eligible to bump into the positions in the departments set forth above.

The evidence also establishes that Kamihanda, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Kamihanda could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Kamihanda was laid off.

Kamihanda submitted her application for disability leave on the day of her layoff. We do not know what accounted for the coincidence of her disability application with her layoff. She was working until the day she was laid off. It is conceivable that she would not have submitted her application had she been given the opportunity to bump other employees.

Rosalind Nichols-Akin

Rosalind Nichols-Akin did not testify. Karsos testified about her employment.

Nichols-Akin worked on 3 West in the 7:00 am to 7:00 pm shift and was laid off on February 2, 2012. The positions listed as available for bumping are those in PACU, ER, OR, ICU, Pediatrics, L&D and 3 West.

Karsos gave reasons why Nichols-Akin was not fully qualified to work on any of those units, however noting that it would take only three to four weeks for her to become fully qualified to work in PACU, three to four weeks to work in the ER but several months to be fully qualified to work in the ER, and six months to function somewhat independently in the OR.

Karsos further testified that she was not fully qualified to work in the ICU, pediatrics or L&D. However, she could have bumped into a position on 3 West including that held by less senior Alice Oguku. Karsos noted that Nichols-Akin was afforded the opportunity to bump Oguku but told Karsos that she could not work the night shift.

Karsos noted that Nichols-Akin could also have bumped into a 3 West positon held by Marina Belaya, an RN intern, but according to her that was not really a position.

Karsos testified that Nichols-Akin could not be recalled to available positions in L&D because she was not fully qualified to work in that unit. However, a position was available in 3 West but it was occupied by Joon Lee, an intern. Karsos explained that Lee's position was not "really … a position" to which she could be placed since the internship was a "training program."

For the reasons stated above and because Nichols-Akin could have bumped into the position held by RN intern Belaya, and recalled to a position held by RN intern Lee, she was eligible to bump.

The evidence also establishes that Nichols-Akin, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes Nichols-Akin could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Aturozi, or Lyubiv Zhuravkov, all of whom were hired after she was laid off.

Dawn Higgins

Dawn Higgins, who did not testify, was laid off on February 4, 2012. She worked on the 7:00 am to 7:00 pm shift in 3 West, the med/surg unit. She was eligible to bump into positions in the PACU, ER, OR, ICU, Pediatrics and L&D.

Karsos testified as to why Higgins was not fully qualified to work in those units. According to Karsos, Higgins was qualified to work in 3 West and could have bumped Alice Oguku on the same shift she had. However, according to Karsos, Higgins declined that position.

Karsos also testified that Higgins was eligible to be recalled to available positions in L&D, which she was not fully qualified for. A position in 3 West was held by Joon Lee, an intern, and Karsos applied the same reasoning to Higgins as she did, above, in explaining why Higgins could not bump into Lee's position.

I find, as above, that Higgins should have bumped into the positions she was eligible for and should have been recalled to Lee's position.

The evidence also establishes that Higgins, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes Higgins could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Aturozi, or Lyubiv Zhuravkov, all of whom were hired after she was laid off.

Elma Pineda

Pineda, who did not testify, was laid off on February 6, 2012 when she was employed in the pulmonary unit on the 7:00 pm to 7:00 am shift. The positions to which she could bump were those in the PACU, ER, OR, ICU, pediatrics, L&D and 3 West.

Karsos testified why Pineda was not fully qualified to work in those units. However she could have bumped Alice Oguku in 3 West. Karsos also stated that she had no personal knowledge whether Pineda was afforded an opportunity to bump Alice Oguku. However, the Respondent maintains that there is no evidence that it failed to extend an offer that she bump Oguku.

As to recall, Pineda could have been recalled to L&D, but Karsos testified that she was not fully qualified to work in that unit. She could have been recalled to 3 West occupied by RN intern Loon Lee.

The evidence also establishes that Pineda, whose hire date was December 7, 2010, could have bumped into a position occupied by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Pineda could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Aturozi, or Lyubiv Zhuravkov, all of whom were hired after she was laid off.

Luzyrene Tomala

Tomala did not testify. She worked in 3 West, the med/surg unit, when she was laid off. There were available positions in L&D, ICU and pediatrics. Karsos testified that she was not fully qualified for any of the positions in those units.

According to Karsos, Tomala did not apply for vacant positions when 3 West was closed. Further, although a position was available for recall in 3 West, Tomala had already refused to fill certain vacancies in that department.

Tomala, whose hire date was December 7, 2010, could have bumped Lyudmyla Bendas and Marina Belaya who were newly hired in July and November, 2011, respectively. She could have also bumped less senior nurses who worked in the Rehab department, L&D, ICU and Pediatrics.

The record also shows that she could have been recalled ahead of Lauren Terhune who worked in L&D, and Menard Tchoubia Tchatchou, who worked in the ICU. Both nurses were hired on November 7, 2011 and July 5, 2011, respectively, after Tomala was laid off in June, 2011. Tomala had experience in the L&D and ICU units and could therefore have worked in those units.

The record establishes that Tomala could have bumped into positions occupied by various employees in the ER, OR, L&D, and PACU, all of whom had been hired after she was hired.

The record also establishes that Tomala could have been recalled ahead of Lyudmyl Bendas, Marina Belaya, Alice Oguku, Mabis Abby, and Nicole Cabrera, who were hired on July 11, 2011, November 7, 2011, and August 1, 2011, and September 12, 2011 (Abby and Cabrera), respectively, after Tomala was laid off on June 13, 2011, and all of whom worked in 3 West.

Pedro Leon

Leon, who did not testify, worked in the ER when he was laid off on October 2, 2012. Karsos stated that he made several documentation and medication errors, and was scheduled to be disciplined. On October 2, Leon accepted a “voluntary layoff.” Karsos testified that he did so because he was “at risk for being terminated.” Pavisic accepted his “proposed voluntary layoff.”

No other RN was laid off from the ER and accordingly no position was available for bumping or recall.

I find that Pedro Leon was not entitled to bumping or recall rights.

Danuta Majdosz

Majdosz, who did not testify, was laid off on November 2, 2012 at which time she worked the 7:00 am to 3:00 pm shift in the Rehab unit. Karsos testified that she was not fully qualified to bump into available positions in the ER, OR, L&D and Pediatrics.

However, Karsos testified that she could have bumped into three positions on 3 West, those occupied by Bendas who worked 3:00 pm to 11:00 pm, and Marina Belaya who worked 11:00 pm to 7:00 am, and a per diem position. However, she rejected those positions because she did not want to work at night but preferred to work her usual 7:00 am to 3:00 pm shift.

In addition, the only positions available for recall were those in the ER, OR, L&D, ICU and 3 West. However, those positions were only available on the 3:00 pm to 11:00 pm and 11:00 pm to 7:00 am shifts, which Majdosz had previously rejected. I find that Majdosz should have been recalled to those positions.

The evidence also establishes that Majdosz, , whose hire date was December 7, 2010, could have bumped into positions held by various nurses in 3 West, PACU, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that Majdosz could have been recalled to various positions in 3 West, ER, OR, or Pediatrics, occupied by other nurses, all of whom were hired after she was laid off.

Jinumal Joseph

Joseph did not testify. She worked in 3 West. According to the General Counsel's evidence, she was laid off on August 22, 2012. However, documents in evidence state that Joseph sent a letter dated August 22, 2012 in which she informed the Respondent that she was resigning for personal reasons.

Inasmuch as there was no evidence that Joseph was advised of her bumping rights she may not have resigned. Rather, the evidence establishes that she could have bumped Lyudmyla Bendas, Alice Oguku, Marina Belaya, or Joon Lee, who also worked on the 3 West unit. All four nurses were less senior to Joseph.

The evidence also establishes that Jinumal could have bumped into a position occupied by various nurses in 3 West, ER, OR, ICU, Pediatrics and L&D, all of whom were hired after she was hired.

The evidence also establishes that she could have been recalled to a position in 3 West occupied by Anara Hamded, or positions in the ER, OR, L&D, and ICU occupied by other nurses, all of whom were hired after she was laid off.

Lauren Terhune

Terhune, who did not testify, was hired on November 7, 2011 and worked in L&D. According to the General Counsel's evidence, she was laid off on May 31, 2012. However, documents in evidence establish that on May 4, 2012 she sent a letter stating that she was resigning effective May 31, 2012.

The record shows that Terhune had equal seniority to that of Marina Belaya, a 3 West nurse. Accordingly, Terhune could not have bumped Belaya and therefore it has not been shown that she could have bumped another employee with less seniority.

However, the evidence also establishes that Terhune could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Terhune was laid off.

Kerri Nangle

Nangle, who did not testify, was hired on November 7, 2011. She worked in L&D. Nangle is listed on the General Counsel's exhibit as being laid off on April 12, 2012. A document in evidence establishes that on July 31, 2012, Nangle sent a letter which stated that she would be resigning effective August 31, 2012.

The record shows that Nangle had equal seniority to that of Marina Belaya, a 3 West nurse. Accordingly, Nangle could not have bumped Belaya and therefore it has not been shown that she could have bumped another employee with less seniority.

However, the evidence also establishes that Nangle could have been recalled to the position in 3 West occupied by Joon Lee, or positions in L&D occupied by Annie Joseph, Bianca Taurozzi or Lyubiv Zhuravkov, all of whom were hired after Nangle was laid off.

Maria Bambico

Bambico, who did not testify, was laid off on October 29, 2012 as a Rehab nurse. As testified by Karsos and confirmed by documentary evidence, Bambico was offered and accepted a position on 3 West following her layoff and effective November 4, 2012. Accordingly, she was not denied bumping or recall rights.

Fe Torrecampo

Torrecampo, who did not testify, is listed on General Counsel exhibit as having been laid off on April 12, but Karsos testified that she was discharged on April 23, 2012. Documentary evidence citing a specific instance of alleged misconduct supports Karsos' testimony. Inasmuch as Torrecampo was discharged, she had no bumping or recall rights.

Conclusion

As to those nurses who I have found the Respondent failed to offer bumping rights and recall rights, I find that the Respondent unlawfully modified the contract which provides that those nurses have certain rights to bump and be recalled. Such modification of the contract was done without the Union's consent.

For the reasons set forth above I find that the Respondent did not have a sound arguable basis for believing that the contract allowed such a modification or for failing to offer those nurses their bumping and recall rights. There cannot be two different interpretations to the express language of the contract which provided for bumping and recall rights.

d. The Technical and Service units

The complaint alleges that certain technical and service unit employees were not offered bumping and recall rights.

i. The Technical Unit

Boni Bodalia

Bodalia testified that she worked as a full-time medical tech in the laboratory where she processed all specimens. She was hired for microbiology work. She stated that the term "lab tech" and medical tech" are the same.

Bodalia stated that the laboratory has two separate departments: the general lab and the microbiology lab. She performed microbiology work but was also trained in general lab work, including chemistry, urinalysis, and hematology.

Dr. Alan Rimmer, the laboratory director, testified that the title medical tech is obtained following a special four year bachelor's degree program in medical technology. The lab tech position requires a bachelor's degree in biology, chemistry or any health related discipline.

Dr. Rimmer stated that following their training, the medical techs and lab techs may work in the hematology, blood bank and chemistry departments because they perform the same duties, and in fact the medical techs and lab techs are "interchangeable," performing the same type of work – testing specimens and releasing the results of those tests.

Dr. Rimmer further stated that a lab tech or medical tech may work as a microbiology tech. He further stated that Bodalia worked in the microbiology department as a lab tech. In April, 2012 he requested a change in her title from lab tech to medical tech, and two months later, from medical tech to microbiology tech. This latest change to microbiology tech was prompted by her submission of her education evaluation in April or May, 2012. He also requested a change in her status from per diem to full-time with a consequent change in salary. He noted that per diem employees earn more money than full-time workers. Bodalia continued to work in the microbiology department through her changes in titles.

Dr. Rimmer stated that Bodalia was not trained in hematology during his tenure with the Respondent. He noted that before she was laid off she worked weekends, which was required. Although she preferred not to work weekends, she occasionally did so.

Dr. Rimmer testified that upon his hire in April, 2012, he was informed by Bodalia, then a per diem employee, that she wanted to work as a microbiology tech on a full-time basis. He agreed with her request and based on her verbal description of her credentials he believed that she was qualified for the job. However, he then reviewed her documentation including her diploma from a school in India, and found that she possessed a BS in special subject microbiology and a master's degree.

Dr. Rimmer stated that a graduate from a foreign school must be evaluated by an international organization which determines whether such a degree is equivalent to a degree from an American university. He found that such an evaluation was not contained in her file and asked her for it. Some time later she produced an evaluation dated November, 2009. The evaluation stated that her foreign degree was equivalent to a U.S. bachelor's degree but consisted of only 110 semester units of undergraduate course work. Dr. Rimmer concluded that she did not have the equivalent of a U.S. bachelor's degree.

Dr. Rimmer stated that he told Bodalia in June, 2012 that she did not have the appropriate equivalent degree. He conceded that under New York State law a lab tech needs

only 90 credit hours of college study to work in that capacity. She was not discharged or disciplined because she did not possess the equivalent of a U.S. bachelor's degree. Nor did he have to change her job title because her 110 credit hours qualified her to work as a microbiology tech based on her experience and general education. He concluded that she was qualified to work as a lab tech with "serious" restrictions. She could continue to work in the microbiology department but could perform only automated tests but not manual tests.

Dr. Rimmer stated that Brianna Rousso, Bodalia's supervisor, told him that there was an "issue" with Bodalia's schedule – that no one was available to work weekends because Alex Hsu requested weekends off. Rousso asked Bodalia to work on a particular weekend and she refused. Dr. Rimmer also asked Bodalia and she again refused. Dr. Rimmer told her that the union contract required that a tech work at least every other weekend. He did not insist that she work that weekend and Bodalia did not do so. Bodalia stated that before her layoff she worked the morning shift during the week, but occasionally worked, if needed, on the evening shift and on weekends. The record indeed shows that she worked on the weekends on a fairly regular basis.

Two microbiology techs, including Alex Hsu, were employed at the time that Dr. Rimmer laid off Bodalia in March, 2013. He stated that he laid her off because there was a great decrease in microbiology testing and other work, and that the amount of work for that position did not justify more than one microbiology tech.

Dr. Rimmer could have chosen Alex Hsu for layoff. Hsu was less senior than Bodalia, and was a per diem employee, who, according to Garrity, worked part-time and as such, Bodalia was not entitled to bump into Hsu's position. Bodalia stated that she was qualified to perform the work that Hsu did. Bodalia stated that she was not told that she could bump into Hsu's position or any other position. Although Hsu worked on the weekends Bodalia did so also.

Bodalia was replaced by others who were hired within the six month period during which she was eligible for recall. Dr. Rimmer's explanation for the hire of those other techs and not Bodalia was that they were hired as medical techs who were "expected" to work in all laboratory departments and in all areas, whereas Bodalia was restricted to microbiology work.

I find that Bodalia could have bumped into Hsu's position. Bodalia performed the same work he did and worked on the weekends as Hsu did.

Yesenia Ortiz and Barbara McCoy

Yesenia Ortiz and Barbara McCoy were employed as OR techs by Liberty and continued their employment when the Respondent purchased the facility. They assisted the physicians in the OR, set up the room, and obtained the needed equipment and instruments.

McCoy testified that all OR techs did the same work and that she could perform the work that any other OR tech did. Ortiz ande McCoy were laid off in April, 2012. Pavisic told McCoy that she was being laid off due to a low workload. He did not tell Ortiz and McCoy about their bumping rights nor were they told that they had a right to be recalled.

The record reflects that either Ortiz or McCoy could have bumped OR tech Carmen Giron who was hired in March, 2011 and thus had less seniority than either woman.

Owen Newby

It is alleged that the Respondent failed to permit Owen Newby, a med tech, to bump a less senor employee.

Dr. Rimmer testified that Newby was a per diem evening shift employee who worked full-time elsewhere. After a discussion regarding his work hours, Newby resigned. The General Counsel's computerized record received in evidence, listed Newby as a per diem worker. The Respondent argues that, as a per diem employee, Newby had no bumping rights.

The evidence establishes that Newby, hired on February 3, 2013, worked as a per diem "Med Tech" in "LAB-Administration." The record shows that Newby could have bumped Desiree Villarza, hired on February 25, 2013, Debart Nouh, hired on March 11, 2013, and Nina Deguzman, hired on May 20 , 2013. All three employees had less seniority than Newby and were also listed as per diem Med Techs in the Lab-Administration department.

ii. The Service unit

The General Counsel argues that full-time and part-time service employees who were allegedly denied bumping rights and recall rights could have bumped per diem service employees.

The Respondent argues that full-time and part-time employees may not bump per diem employees, relying on those contract provisions which state that per diem employees are not included in the recognition clause, are not part of the service unit, have no guaranteed hours of work, and have no rights under the contract. Section 15.3 of the contract recognizes that a per diem employee is an employee who works on an as-need basis.

Per diem employees have certain rights as they relate to seniority under the contract. Thus, Section 5.2(c) in referring to the accrual rights of classifications of employees, states that full-time and part-time employees have seniority over per diem employees. Thus the contract recognizes the seniority rights of full-time and part-time employees over per diem workers.

The Respondent correctly argues that the contract does not expressly provide that full-time or part-time employees may bump per diem workers. The contract states that "a full-time employee will bump a less senior full-time employee first, less senior part-time employee if there is no less senior full-time employee to bump, so long as s the part-time employee being bumped has less seniority pursuant to Section 5.2c,…For the purposes of this entire provision per diem seniority is not considered. Part-time employees will bump only employees in the part-time status."

However, the contract does not expressly prohibit a full-time or part-time employee from bumping a per diem worker. The contract may prohibit the per diem employee from exercising her seniority rights to bump a full-time or part-time employee, but the contract does not prohibit the reverse. Thus, full-time and part-time workers may bump per diem employees.

That part of the contract which states that "per diem seniority is not considered" clearly refers to the fact that a per diem employee's seniority does not override the seniority of full-time or part-time workers. However, that section does not prohibit a full-time or part-time employee from bumping into a position occupied by a per diem worker.

Accordingly, a per diem worker's seniority is not considered in determining the seniority accrued by full-time or part-time employees. That, however, has nothing to do with the ability of the full-time or part-time worker's ability to bump into a position occupied by a per diem employee. It would make no sense to prohibit such bumping where the contract recognizes that per diem employees' rights, including seniority rights, are inferior to that of full-time and part-time workers. Thus, given the superior rights of full-time and part-time workers it is reasonable to find and conclude that such workers may bump per diem workers.

Delmy Carreras and Katie Polite

Delmy Carreras and Katie Polite worked at the facility for 14 and 35 years, respectively when they were laid off on October 29, 2012. They were housekeepers performing cleaning and sterilizing work in various areas of the hospital.

They testified that they could perform the work that any other housekeeper did, and that when they were laid off the Hospital employed per diem housekeepers. Polite stated that the per diem employees worked the same hours and days that she did.

When Carreras and Polite were laid off they were not informed of their bumping rights or that they had a right to be recalled.

The evidence establishes that either woman could have bumped less senior part-time housekeeper Sonya Cruz. It must be noted that Cruz was not on the computerized list of employees produced by the General Counsel but there was testimony that she was a part-time employee employed at the time that Carreras and Polite were laid off.

Juan Seguinot

The complaint alleges that the Respondent failed to offer bumping rights and recall rights to Juan Seguinot and also changed the bumping provisions of the contract as to him.

Juan Seguinot, the Union's local vice president for the service unit, became employed at the facility in 2001. He worked as a housekeeper, cleaning rooms and mopping halls for about two months. He then became a storeroom clerk where he worked until about 2006 performing shipping and receiving work, preparing express delivery packages, and filling orders for supplies by locating such items in the storeroom and delivering them to the patient floors. He made routine checks of the units in the hospital to ensure that all the units were stocked with needed supplies.

In about 2006, Seguinot became an endoscopy tech, a job which he held for about six years. At the same time he also worked as a transporter, taking patients from one area of the hospital to another. He estimated that 30% to 40% of his job as an endoscopy tech also consisted of his transporting patients, translating for Spanish-speaking patients and setting up the rooms for new patients.

In November, 2012, Kunish told Seguinot that he was being laid off because the position of endoscopy tech was being eliminated. She may have said that there were no current positions available. He was not informed of his bumping rights.

Seguinot stated that he was fully qualified to perform jobs in the environmental services department as a housekeeper, a storeroom clerk, or as a transporter. Seguinot was not told by any manager that the responsibilities of a storeroom clerk or an environmental services worker

had changed since he left those positions, but he did not know if the computer system in the storeroom was the same as it was when he worked in that department.

Union agent Levine stated that the Employer did not tell him that Seguinot was not qualified to work as a storeroom clerk, or that the computer system in the storeroom had changed requiring that he be trained to operate that system.

In response to the Union's request that Garrity advise as to whether any positions were available for Seguinot to bump into, she responded that there were no positions in his department to bump into. Levine replied that the contract permitted Seguinot to bump into positions in other departments and that he only be fully qualified to perform that work. Levine specifically asked whether Seguinot had a right to bump into a position as a housekeeper or storeroom clerk.

The General Counsel asserts that Garrity's response, that there were no positions in Seguinot's department into which he could bump, is the basis of the complaint allegation that the Respondent changed the bumping provisions of the contracts.

The Respondent asserts that at the time that Garrity made the comment she had been employed by the Respondent less than three weeks. The Respondent apparently argues that she made an understandable and inadvertent error in stating that Seguinot's bumping rights were limited to his department. The Respondent further notes that Garrity later inquired of the storeroom supervisor to determine whether Seguinot could bump into that department, thereby curing her error.

On the basis of the above, I cannot find that, as alleged, the Respondent changed the bumping provisions of the contracts. There was no change in the contract. Seguinot's right to bump into other departments was explored by the Respondent.

Levine testified that Seguinot's layoff was discussed at the December 4, 2012 labor-management meeting. His classification of endoscopy tech was eliminated and he was laid off. Joanne Dudsak, the president of the local union, told Garrity that Seguinot had the right to bump into another position because he worked at other jobs, including in the storeroom. She asked Garrity to inquire as to what position he could bump into. Levine stated that, at that meeting, neither Garrity nor Mulligan claimed that Seguinot was unqualified because he was not proficient in the computer system. Both said that they would inquire and contact the Union. Levine stated that he did not receive a follow-up communication from them about Seguinot. There was no discussion about the computer at that meeting.

Levine stated that in a meeting on April 4, 2013 attended by him, Dudsak, Garrity and Mulligan, he complained that bumping rights were not being recognized, particularly that of Seguinot. The Employer did not respond as to why it did not believe that Seguinot was entitled to bumping rights. Levine told the Respondent's agents that Seguinot was entitled to bump into any job classification for which he is fully qualified, which included any service bargaining unit position. Garrity maintained that there were no positions in his department into which he could bump. Neither she nor Mulligan claimed that Seguinot was unqualified to operate the storeroom computer. In fact, there was no discussion of the computer system at all. Dudsak argued that Seguinot previously worked as a housekeeper and transporter, was fully qualified to perform those jobs and could have bumped into them.

Garrity stated that at a meeting in April, 2013, the Union said that Seguinot had worked as a storeroom clerk before he was an endoscopy tech, but did not recall the Union saying he worked in environmental services or that the Union asked her to look for storeroom clerk

positions that he would be eligible to bump into. The Union simply said that he should be able to bump someone with less seniority in a storeroom clerk position.

Garrity stated that the Union asked that she review Seguinot's bumping rights. She does not believe that she responded. She and the Union spoke about his experience years ago in the Liberty storeroom. She examined his Hospital personnel file to see what work he did, and spoke to the manager in that department. She was told that the current system, inasmuch as it was computerized, was much different than when Seguinot worked there. She also believed that operating the forklift and becoming familiar with the computerized storeroom operations would require much training. She concluded that Seguinot was not fully qualified for work in the storeroom and that he would need much training to qualify for that position. She did not recall that the Union expressed any interest in him working in any area other than the storeroom.

Afif Escheik, the Respondent's official in charge of support services, stated that in early 2012 he was the director of the hospital's "supply chain" responsible for the storeroom. When he became in charge of the storeroom in November, 2011, he found it disorganized and that its written policies and procedures were not being followed. He observed that deliveries were not being made or recorded. He said he retrained the storeroom clerks for five or six months.

One of the duties of the storeroom clerk was to "maintain the computer inventory system in a timely and efficient manner." Escheik said that this is done through a materials management system. The computer was installed in December, 2010. The job description of storeroom clerk was in place when Escheik became responsible for that area and he has not changed that description.

The clerk's daily duties included unloading and receiving inventory. The clerk then visits the various hospital units to determine what supplies are needed. He retrieves items needed from the storeroom, inputs those items in the computer and then restocks the units with the items needed.

Escheik noted that storeroom clerk Ahmad Abdelqader was hired in June, 2012. At the time of Seguinot's layoff in November, 2012, Abdelqader had less seniority than Seguinot. It is undisputed that the least senior clerk was Abdelqader who would be bumped if Seguinot was offered bumping rights.

Abdedlqader's sole qualification for the job was a high school diploma, a prerequisite for the position. He had prior experience in a stockroom outside the Respondent, but no experience with the use of a storeroom computer. Escheik and his assistant Edwin Gonzalez trained Abdelqader. Escheik estimated that it took Abdelqader 90 days of training to be able to work on his own and function independently in the storeroom.

It must be noted that Abdelqader was not employed when Escheik began his reorganization of the storeroom and retrained the clerks then employed there. Thus, Abdelqader did not benefit from the five or six month retraining the current clerks had but, nevertheless, was able to become fully qualified and work independently there after his 90 day training period.

Escheik was aware that Seguinot wanted to bump an employee in the storeroom. Escheik was told by Garrity that Seguinot worked as a storeroom clerk perhaps when he was laid off in November, 2012. Without speaking to Seguinot concerning his experience in the storeroom Escheik reached the conclusion that Seguinot was not qualified to work there, basing that decision on the vast extent of training he provided to others. Escheik testified that in order to bump into a position Seguinot would have had to "go right into the position with no training."

It is clear that Seguinot should have bumped into Abdelqader's position. I cannot credit Escheik's testimony that Seguinot was not eligible to bump into that position because he must have been able to begin work immediately without training. Apparently, Escheik made the 90 day training period available for Abdelqader. No reason was given as to why the same period of time could not have been provided to Seguinot, who had five years' experience in the storeroom.

I find, as alleged, that Seguinot was unlawfully denied bumping rights and recall rights.

iii. The Recall of Service Unit Employees

Three-West nurses' aides Silvia Scull and Sherri Barnwell were laid off on April 15 and 16, 2012, respectively. The General Counsel argues that they were denied recall since nurse's aide Susan Petrowsky was hired on October 9, 2012, within six months following the layoffs. He asserts that Scull and Barnwell should have been recalled prior to the hire of Petrowsky.

Similarly, nurse's aide Diana Rizzo and Nurses Aides II, Dwana Mack, Digna Dennehy, Nicole Robinson, and Magdalena Alfonso were laid off on November 2 and 3, 2012. The General Counsel argues that they were denied recall since nurse's aide Norris Diaz was hired on February 11, 2013, which was within the six month period after the layoffs. He contends that the laid off nurses' aides should have been recalled prior to the hire of Diaz.

The Service Contract states:

> Section 5.3 Loss of Seniority
>
> An employee's seniority shall be lost when he/she:
> (d) is laid off for a period of six months or a period exceeding the length of the employee's seniority, whichever is less;
> Section 5.7 Recall
>
> Whenever a vacancy occurs in a job classification, employees on layoff with classification seniority shall be recalled in accordance with their classification seniority in the reverse order in which they were laid off. If a vacancy occurs in a job classification where no employee on layoff has classification seniority, then the laid off employee with the most seniority will be recalled if he/she is fully qualified to perform the work, and if not, the employee with the next highest seniority will be eligible for recall, and so on.

As set forth above, the contract provides that employees lose their seniority when they are not recalled within six months of their layoff. Here, the Respondent failed to recall the affected employees within six months of their layoff, but instead hired new employees to perform the same work they did. They retained their seniority during the six month period following their layoff and, accordingly, could not have been replaced by new hires during that period of time.

The Respondent argues that the General Counsel has not shown that the laid off employees were "fully qualified" to be recalled for the positions occupied by Petrowsky and Diaz. As set forth above, the service contract, unlike the nurses' contract, permits the recall of

an employee who has classification seniority without regard to whether she is fully qualified to perform the job. The "fully qualified" requirement is only applicable when no laid off employee has classification seniority.[7]

Here, all the laid off nurses aides were employed since December 7, 2010 in 3 West. Newly hired nurses' aides Petrowsky and Diaz were hired to work in the ER. The Respondent argues that the skills required in the ER are more specialized than those of nurses' aides in 3 West which encompasses the med-surg and Rehab units.

Although there was testimony concerning the duties of the registered nurses in those units, there was no specific testimony as to the duties of the nurses' aides in any of those units.

Nevertheless, as set forth above, the contract does not require nurse's aides who have classification seniority to be "fully qualified." The nurse's aides who were laid off had classification seniority as nurse's aides and should have been recalled prior to the hire of Diaz and Petrowsky.

Discussion

For the reasons discussed above, I find, as to the employees who the Respondent failed to offer bumping rights and recall rights, the Respondent unlawfully modified the contract which provides that those employees have certain rights to bump and be recalled. Such modification of the contract was done without the Union's consent.

For the reasons set forth above I also find that the Respondent did not have a sound arguable basis for believing that the contract allowed such a modification by failing to offer those nurses their bumping and recall rights. There cannot be two different interpretations to the express language of the contract which provided for bumping and recall rights.

I. The Alleged Refusal to Apply the Service Contract to Hospital Assistants and Nursing Assistant Interns

The complaint alleges that since about November 16, 2012, the Respondent has failed to continue in effect all the terms and conditions of the Service Contract by refusing to apply that contract to hospital assistants.

The complaint also alleges that since about April, 2013, the Respondent failed to continue in effect the Service Contract by refusing to apply it to nursing assistant interns.

A. Hospital Assistants

"Hospital assistants," as they are called in the complaint, is a term that was used interchangeably at hearing with "hospital associates." The Respondent argues that the term "sitters" is also interchangeable with those two terms. Educational director Arthur Kharonov stated that the term "hospital associates" was used for only one week.

[7] This is unlike the nurses' contract which requires, in the first instance, that "the employee may only bump into a position where he/she is fully qualified to perform the job.

Kharonov conceded that prior to the hire of the five or six "sitters," that function was performed by the nursing assistants. One sitter was scheduled per shift, but they were not needed each day. At the time of the hearing, the Hospital employed three sitters each of whom worked one shift per day. If no sitter was needed on a particular day, the shift would be cancelled prior to its start, but a sitter was scheduled each day in the event that she was needed.

The sitters' tasks included sitting at the doorway to a patient's room and watching the patient. Those patients who were assigned a sitter needed to be observed due to their suicidal or other harmful behavior. If the sitter observed some problematic behavior they would call the nurse.

Nursing assistant Yvette Garvin testified that the hospital assistants who were hired in April or May, 2013, performed all the jobs she performed, but they did not have physical contact with the patient. Garvin opined that the hospital assistants' employment affected the nursing assistants' ability to receive overtime work because the sitters did the work, observing patients for 24 hours, that the nursing assistants could have done, and in fact used to do before the sitters were hired.

Garvin stated that the assistants answered the phone at the nurse's station, transported blood work to the lab, and stocked the shelves with supplies. She also testified that they worked in the ER and on the nursing floors.

Kharonov stated that he did not see any sitter being asked by a nurse to perform a nursing assistant task. On one occasion, a sitter transported a patient to the x-ray department. At that time, Karsos told Kharonov that the sitters' only function was to sit.

Kharonov testified that he was not aware that an RN asked a sitter to perform nursing assistant's duties. Nor did he see a sitter work in the ER or take a specimen to the lab or make a bed.

The Respondent contends that Garvin's testimony is unreliable because she is biased against it due to her discharge. The Respondent has established no basis for that claim.

Discussion

The Respondent argues that sitters are per diem employees who performed no bargaining unit work, have no rights under the contract, and are excluded from the service unit. It contends that they fit the specific job description of a per diem worker – one who works on an "as needed basis" who is not guaranteed work hours.

"Sitters" have been included in bargaining units of certified nurses' aides. *Mountainview Hospital, Inc.,* 356 NLRB 1384 (2011); *Cogburn Healthcare Center, Inc*., 335 NLRB 1397 (2001). The work they did as set forth in the above cases is similar to the work performed by the sitters at the Hospital.

Significantly, Kharonov testified that prior to the hire of the hospital assistants, the nursing assistants performed such work. Thus, the hospital assistants have been performing indisputably unit work – the work the nursing assistants did.

I credit Garvin's testimony which corroborated that of Kharonov. It was her observation that the hospital assistants continued to perform some of the work that she did prior to their hire. Thus, she stated that the hospital assistants answered the phone at the nurse's station,

transported blood work to the lab, and stocked the shelves with supplies. She also testified that they worked in the ER and on the nursing floors.

Even assuming that the hospital assistants did nothing but "sit," such sitters have traditionally been included as part of the service department unit. *Mountainview and Cogburn*, above.

The hospital assistants are not per diem workers who are not guaranteed work hours. Here, according to Kharonov, the Respondent schedules the sitters each day. The fact that the sitter's shift may be cancelled is no different than any other unit employee whose shift may be cancelled depending upon circumstances which may arise.

B. Nursing Assistant Interns

Kharonov stated that it was his idea to begin a nursing assistant training program as another of the Hospital's educational programs. He recommended the program to Karsos for the purpose of training people to become nursing assistants. Karsos asked him to develop a curriculum based on the skills of a nursing assistant.

Joseph Crouchman, the education department director, developed a pilot program curriculum which was approved by Karsos. He examined nursing assistant standard curricula and reviewed state guidelines concerning the requirements for nursing assistants such as the number of hours and clinical experience required. He developed a program that was modeled after the state's program for certified nursing assistants. However, no approval to conduct the program from the state was requested or received. The national standard was 40 hours of class. The Respondent's program consisted of 60 hours of classroom work which included tests, daily presentations and work with simulation mannequins. Upon completion of the program the nursing assistants did not become certified.

Advertisements were placed for nursing assistants, also called nurse's aides, but no one with experience applied. Kharonov interviewed the inexperienced applicants who expressed an interest in working in the medical field. He told them that the program would be held for about five weeks and was unpaid. He explained that the program would help them develop their skills and enable them to determine if they wanted to work in a hospital environment as a nursing assistant.

Crouchman prepared the course materials and interviewed and taught the students. He denied speaking with the interns regarding the possibility of employment with the Respondent following their completion of the program, but nevertheless testified that when they were interviewed some applicants asked if they would be hired at the conclusion of the program. He told them "absolutely not," explaining that there was classroom work, hands on training, and the requirement that they pass certain tests.

There were no prerequisites for admission to the program which ran for five weeks, from April 29 to June 5, 2013. Eight students began the program which included 60 hours of class work constituting one-third of the program, and two-thirds clinical work consisting of four hours per day for four weeks in five clinical departments. During their clinical work the interns worked with patients under the direct instruction and supervision of the preceptor RNs to whom they were assigned by Kharonov. The interns took patients' vital signs, worked with a glucometer, applied EKG devices and moved and handled the patients. They were trained to conduct assessments which, according to Crouchman, included physically handling the patient. He stated that he never saw a preceptor RN working with more than one nursing assistant intern at one time.

During the course of the program the nursing assistant interns were not included in the Respondent's staffing numbers.

About eight nursing assistant interns began the program. They had classroom work for about one week which included an introduction to the program and orientations. In their second week they spent the morning in the ER, from about 7:00 am to 11:30 am, and then had classroom training with Crouchman in the afternoon.

Kharonov introduced the interns to the ER nurses, explaining that they were there to observe, learn the skills necessary to work in the medical field, and that each nurse would be paired with one intern. He asked the nurses to "try to teach them whatever you can in your scope of practice." The nurses were paid extra for teaching the interns and engaged in this work on a voluntary basis.

There were four nurses in the ER. On a daily basis, Kharonov assigned as preceptor whoever was scheduled to work that day. There was no set preceptor for any of the interns. Four nurses worked on the day shift when the interns were in the ER. Each intern was paired with three people – a nurse, a regularly employed nursing assistant, and Kharonov who precepted the interns for two to three hours each day. He did not precept more than one intern at a time. At the time there were about five or six interns.

Kharonov described their training. The interns observed the patients and the care given them in the ER. They were taught how to take the patient's history and vital signs including blood pressure, pulse, respiration, and temperature. He showed them the equipment used in that department. As the interns observed Kharonov's patient care work, he explained what he was doing and why.

For example, Kharonov placed a blood pressure cuff on a patient and then asked the intern to do the same, explaining how it was done. He stated that the intern was with him during the entire time that he was in the ER. Once the intern developed the skills necessary, she listened with a stethoscope and took the patient's temperature and counted respirations. The interns developed those skills at their own pace.

Kharonov stated that he told the interns that they could not provide care or do anything on their own, meaning outside the nurse's presence in the room. The interns were not permitted to, and did not provide care on their own. Nor were they allowed to enter a patient's room without being accompanied by a nurse. He told them that if a nurse told them to perform a task on their own they had to refuse unless the nurse was in the room with them. He stated flatly that the nurse had to be in the room with them at all times. In fact, he told them that they could not do anything on their own or he would dismiss them. They did, however, place a blood pressure cuff on a patient on their own, but in the nurse's presence.

Crouchman also explained their training. He gave them 40 to 60 hours of classroom work. They had 100 to120 hours of clinical training which took place in the ER, L&D, med/surg, telemetry and Pediatrics units. They were observed when they took vital signs, worked with a glucometer, affixed electrocardiograms, and moved and handling patients. He stated that the nurses were present when the interns performed their work.

He stated that he observed the interns in the ER performing some of the skills, with the preceptor present, referenced in their evaluations.

Crouchman testified that by the second day of their clinical training, the participants "really started working with the patients. They knew how to use the blood pressure cuff and how to assess a pulse and respiration, moving the patients. They were interacting with the preceptor

a little more and interacting with the patients a little bit more. So, it's fair to say that by the second day of the clinical training program the participants were actually providing care."

The interns took frequent exams and were evaluated. One form received in evidence stated that the intern being evaluated functioned at the level of an experienced nurse's aide. Crouchman stated that that evaluation indicated that she was actually performing the function of an experienced nurse's aide.

Kharonov appointed Yvette Garvin, a certified nurse's aide, as the preceptor for the interns because she was a nursing assistant who worked in that department and was familiar with the interns' duties.

Garvin stated that in April or May, 2013, Kharonov asked her to train six new nursing assistants who were hired. She was not given any training materials. The program was five to six weeks in duration, during which time she trained them. They also were given instructions from the nurses and were asked to help them by positioning the patient in bed and undressing them.

Garvin precepted all six interns but only five completed the program. She occasionally precepted all of them at the same time. They worked with Garvin in the ER in the morning Monday through Friday for about one week. After the morning session they received classroom training. They then rotated to other departments with Garvin training one of the interns for about two weeks.

Garvin stated that one nursing assistant intern was employed per shift. She showed them how to perform electrocardiograms and other testing modalities. The interns' duties included taking vital signs, feeding patients, transporting specimens to the laboratory, transporting patients to testing areas, applying bandages, measuring patients for crutches and teaching their use, and answering the telephones. Much of the interns' work was done at the direction of the nurse or physician.

When Garvin believed that the nursing assistant intern was competent, she observed the intern as she performed a certain task and then permitted her to take vital signs, sign in lab work, do EKGs, and then, about one to two weeks after the intern's arrival in her unit, when she was confident in their ability, she permitted her to work on her own without observing her. At those times, on their own without being observed by Garvin, they took vital signs and bandaged the patient. Those instances were infrequent, however.

Garvin evaluated the interns and certified in writing that they completed all nursing assistant duties and skills, and that they were competent in their duties.

At the end of the five week program the nursing assistant interns took a written test and had a skills session which concluded with a clinical test where the interns demonstrated to Kharonov and Crouchman their ability to take accurate blood pressure, respiration, temperature and perform an EKG, as well as routine tasks such as moving a bed up and down and finding and setting up equipment.

At the conclusion of the program, of the eight students who started, one had resigned, and two had failed out. The remaining five interns passed their examinations and were given a "certificate of completion." Kharonov approved all five interns as being competent. The interns were not paid during the course of the program and they were not charged tuition. Upon the completion of the program all five were offered a position and hired as paid per diem nursing assistants.

Discussion

In a letter dated June 11, 2013, one week after the nursing assistant interns completed the program and had been hired as nursing assistants, Levine wrote to the Respondent that the Union was aware that the Hospital has been employing workers in the title of Nursing Assistant Intern. He demanded that the Union be recognized as the representative of those employees in the service unit. The Respondent refused to include them in the service department unit.

The General Counsel argues that the nursing assistant interns are members of the service bargaining unit who provide direct patient care. The General Counsel further argues that the interns underwent the same orientation as is conducted nationwide for regular full-time nursing assistants. However, no evidence was produced as to what such national orientation consists of.

The Respondent contends that the five-week course of training was "exclusively educational in nature," there being no economic relationship between the students and the Hospital. In this respect, the Respondent cites *WBAI Pacifica Foundation* and *Brevard*, above. For the reasons given, above, I find that those cases are inapposite to the facts here.

In contrast, the General Counsel maintains that the interns provided an economic benefit to the Hospital in which, following the initial, general hospital orientation, they performed work which the regular nursing assistants performed. He further argues that the interns had an expectation that they would be hired or they would not have worked without compensation for five weeks.

The Respondent argues that the nursing assistant interns were "students" and thus excluded from the Service Contract. The contract excludes "students who are performing their clinicals or whose performance of work with the Employer is part of the educational course of study that such students are pursuing…." The Respondent maintains that as students, the interns may not be considered employees.

The Respondent misapplies the contract's description of the term "students" to the facts here. The contract is a clear reference to students whose work is incidental to their primary activity as students. The "students" here are not, in any traditional sense pursing an "educational course of study." They are apprentices or people in training to become nursing assistants.

The training given by the Hospital cannot be considered a recognized "educational course of study" as would be given in a vocational school. Here, no certificate is given by the state upon the nursing assistant intern's completion of her training.

The work performed by the nursing assistant interns was not incidental to their educational objectives. They were being trained as nursing assistants and all those who completed the training were hired as nursing assistants. They did not return to their educational course of study after their training ended. They began work as nursing assistants immediately.

In *Beecher Ancillary Services, Inc.*, 225 NLRB 642 (1976), the Board included technologist student-trainees in a unit of technical employees, finding that they "are more akin to apprentices than they are to students." The Board found that they work under the guidance of a technologist "receiving on-the-job training under the watchful eye of skilled workers." The Board held that the individuals being trained to perform certain routine tasks were not "students" acquiring an "education" as those terms are commonly understood, or as they were intended in *Cedars-Sinai Medical Center,* 223 NLRB 251 (1976).

In *Rhode Island Hospital.,* 313 NLRB 343, 365–66 (1993), the Board included pharmacy students in a unit of nonprofessional employees. The employer's advertisements described the position "as an opportunity to gain hands-on experience in a comprehensive pharmacy service."

There, the Board found that the students assist the pharmacist in her work and that their work was reviewed by the pharmacist who evaluates their performance. The Board further found that the duties performed by the pharmacy students are "substantially similar to those performed by the pharmacy technicians." The Board included the students in the unit of nonprofessional employees with the pharmacy technicians.

Similarly, here, Kharonov told the interviewees that the program would help them develop their skills and enable them to determine if they wanted to work in a hospital environment as a nursing assistant. In addition, the work they did was substantially similar to the work of the nursing assistants.

I acknowledge that in certain cases, including, *St. Elizabeth's Hospital of Boston*, above, *Lake City House for the Aged*, 229 NLRB 54 (1978) and *Pawating Hospital Assn.*, 222 NLRB 672 (1976), nursing students were excluded from a unit because they were treated differently from nonstudent employees. They worked fewer hours per week and received lower wages. Their work, which was not evaluated, was scheduled to accommodate their school program.

Here too, the nursing assistant interns' terms and conditions of employment differed from other employees. That is attributed to the fact that they were interns.

An important factor, however, recognized in *Rhode Island Hospital*, above, is that their duties were substantially similar to those performed by the nursing assistants. In addition, their work was not scheduled to accommodate a school program. Further, they received no wages because the Hospital chose not to pay them.

Those cases prove only that the individuals excluded from a unit were primarily students and not employees. The fact that their work was not evaluated proves that their putative employer was not as concerned with their work as with their pursuit of an education. Here, the nursing assistant interns were not primarily students. They were frequently given tests and their work was constantly evaluated.

Assuming, arguendo, that the nursing assistant interns are students they are employees covered by the Act. See *Columbia University*, 364 NLRB No. 90, slip op. at 2, 15 (2016) where the Board recently held that under the "very broad statutory definition of employee and employer" student assistants who have a common-law employment relationship with their university employers are statutory employees.

The Board found in that case that the employer maintained control over the student assistants' work. If such work was not adequate they could be removed. 364 NLRB No. 90, slip op. at 15. Here too, if the nursing assistant interns did not pass their exams they could be dismissed and, in fact, two interns failed out of the program.

In *Columbia University*, the Board noted that common-law employment generally requires that the employer have the right to control the employee's work, and that the work be performed in exchange for compensation.

I do not believe that the fact that the nursing assistant interns were not paid requires a finding that they were not statutory employees. The Respondent chose not to pay them. It also

chose not to pay the RN interns but there can be no doubt that they also were employees performing substantially the same work as the RNs.

Accordingly, the fact that the nursing assistant interns were not paid was the Respondent's decision which bore no relation to the fact that they were statutory employees. Here, the Respondent developed the program because it received no applications from experienced nursing assistants. It is clear that the interns were not paid in anticipation of their continued employment by the Respondent. In fact, all the interns who completed the program were immediately hired by the Hospital.

I find and conclude, as alleged, that since about November 16, 2012, the Respondent failed to continue in effect all the terms and conditions of the Service Contract by refusing to apply that contract to hospital assistants, and that since about April, 2013, the Respondent failed to continue in effect the Service Contract by refusing to apply the contract to nursing assistant interns.

I find that the Respondent unlawfully modified the Service Contract by failing to include the hospital assistants and nursing assistant interns in the Service Contract without obtaining the Union's consent.

For the reasons set forth above I find that the Respondent did not have a sound arguable basis for believing that the contract allowed such a modification by failing to include those classifications of employees in the Service Contract.

J. The Alleged Failure to Permit the Union to Meet with Employees in the Cafeteria

The complaint alleges that since about January, 2013, the Respondent failed to continue in effect all the terms and conditions of the contracts by failing to allow Union representatives to meet with employees in the cafeteria.

The contracts provide, in relevant part, as follows:

Section 4.1(4) (RN and Technical Contracts)

> A Union representative shall be given 10 minutes at Nursing orientation to introduce new hires to the union and distribute union material. Time to be scheduled with the Staff Development Instructor.

Section 4.2 (RN Contract)

> The Representatives shall not interfere with the operations of the facility or with instructions given by a supervisor in the regular course of his/her duties, subject to the provisions of this Agreement.
>
> The representatives will not engage in any Union activities during their scheduled work time ("work time" does not include lunch or other scheduled breaks) except with the permission of their supervisor. This permission shall not be unreasonably denied.
>
> In no circumstances shall any union activities occur in patient care areas, which do not include break rooms and cafeteria.

Section 4.3 (Service Contract)

> The Union Representatives shall not interfere with the operations of the facility or with instructions given by a supervisor in the regular course of his/her duties. The Union Representatives will not engage in any activity on behalf of the union during their scheduled work time ("work time" does not include lunch or other scheduled breaks). In no circumstances shall any union activities occur in patient care areas, which do not include break rooms and cafeteria.

Section 4.4 Visitation (Same in RN, Technical and Service, but numbered Section 4.5 in the Service Contract)

> The Union will have the right to visit Hospital premises to investigate grievances provided that the union will call the Human resources Department on the day before the visit. Exceptions may be made for emergencies. In no case shall access interfere with the work of any employee or with a patient's or guest's activities or otherwise disrupt the Employer's operations.

Union agent Torrey testified that when visiting the Hospital prior to June, 2011, he went to Dudsak's area in the PACU. He engaged in Union business there, speaking to Dudsak and other Union agents. Then he went to other areas of the hospital where he spoke to employees regarding workplace issues and grievances. He also spoke with employees at nurses' stations, break rooms and in the cafeteria. Dudsak confirmed that she and Torrey visited the various units and spoke with staff members at the nurses' stations, cafeteria, break rooms and in the radiology department.

Torrey added that, prior to June, 2011, he was never stopped by management from entering any area in the hospital, and during that time he distributed Union literature in hallways where he saw employees at work stations, in the laboratory, the PACU, the pulmonary unit, the ICU, nursing stations, cafeteria and the lounge. He was never stopped by management or security from doing so.

In June, 2011, Torrey distributed, allegedly in patient care areas, Union flyers which were considered "inflammatory" by the Respondent. The Respondent filed criminal trespass charges against him. Dudsak was discharged for allegedly distributing them. The Union filed a grievance in her behalf.

The parties met on July 12 and discussed Dudsak's discharge, but according to Twomey the main focus of the discussion was access to the premises by Torrey. The Respondent wanted restrictions on access to patient care areas by Torrey and other union representatives. Twomey replied that the contract defines the location of patient care areas. She noted that the cafeteria, nurses' stations and the lobby are not patient care areas. Twomey said that the Union did not agree to limit access to only designated areas, arguing that the Employer was attempting to remove access to areas that were not contractually agreed to. Twomey quoted the Employer's representatives as saying that Torrey was trespassing – that he could visit the break rooms and cafeteria but not the patient care areas.

A Memorandum of Agreement (MOU) dated July 14 stated that the Respondent agreed to rescind the discipline issued to Dudsak and to reinstate her with backpay. The Union agreed to withdraw its grievance and unfair labor practice charge. The agreement further states in relevant part:

> C. The Union and Employer acknowledge the provisions of Article 4.3, 4.4 and 4.5 of the contracts and agree to comply with the intent and spirit of these provisions.
>
> 1. The Employer acknowledges the right of union representatives to meet with members during breaks from work in non-patient areas and designated areas as per the contract, such as the break rooms and cafeteria. Union business shall not occur in patient care areas. Representatives shall have reasonable access to employees at places designated in the CBA.
>
> 3. The Union recognizes the right of the employer to operate the hospital, provide patient care and to administer the operation of the facility.
>
> 4. The Union will notify the Hospital Administration office instead of Human Resources, pursuant to Article 4.4 of the contracts.

Respondent's attorney Maurice stated that at the meeting at which the MOU was signed, the parties discussed Dudsak's discharge, other grievances and Board charges. They also discussed the Union's access to the Hospital. He testified that the above resolution of the dispute was an acknowledgement that, pursuant to the contracts, union representatives had the right to meet with members during breaks from work in non-patient areas and designated areas such as the break room and cafeteria. The Respondent's position was that, prior to that time, certain employees were meeting on work time in non-break areas and in patient care areas which was interfering with the work of the Hospital.

The MOU was submitted to the Union membership for ratification because it changed some terms of the contract including the union access provision, the life insurance policy, and notification to the human resources office that Union staff would be visiting the hospital. Twomey noted that the only real change to the contract was the notification provision. The other clauses were "clarifications."

Twomey testified that the MOU was not intended to change the contract. It was for the purpose of agreeing to comply with the intent and spirit of the provisions. Dudsak agreed that the MOU was intended to confirm the right of Union representatives to meet with members in the cafeteria.

After the MOU was signed, Torrey was not prevented from meeting with employees in the cafeteria, hallways and conference room, and he did so.

Dudsak was disciplined for doing union business in a work area of the Hospital. She stated that she was supposed to speak to new employees at a new-hire orientation but because of her schedule she was not able to attend. Instead, according to her, the new hires were sent to her by the human resources department and she spoke with them in the PACU. She was discharged for that conduct and the Union filed a grievance in her behalf.

On October 27, 2011, Torrey met with Pavisic. They discussed various grievances including Dudsak's new discipline and resultant grievance for speaking with new hires in the PACU to which they were sent because the Union had no opportunity to speak with them at the orientation session. They also discussed areas where employee Union representatives could meet with employees and the length of time of such meetings.

Dudsak stated that at no time during various labor-management meetings between October and November, 2011, did the Employer say that the Union should not be engaging in union activity in the cafeteria or that the Respondent wanted union visitation rights to be changed, or that it desired a modification of the July 12 MOU that was signed a few months earlier.

On November 14, CEO Gregorio and Dudsak signed an MOA which stated that the Hospital would remove the warning notice to Dudsak and the Union would withdraw its grievance regarding her. It also provided, in relevant part:

> 3. MHA agrees to provide HPAE a meeting room as designated by MHA every other week subject to the following terms and conditions:
>
> 3.01. HPAE shall notify MHA's Human Resource Director in advance of the scheduled time of the meeting.
>
> 3.02. All meetings shall be limited to a one hour period of time.
>
> 3.03. All meetings shall be limited to no more than two MHA employees in the Room at the same time.
>
> 4. MHA shall have the sole right to cancel the use of the Room at any time upon 30 days notice.

Gregorio testified that that MOU was a renegotiation of the July 11 MOU and restricted access of Union representatives to a designated room. He claimed that Dudsak's distribution of union materials in the PACU created the need to renegotiate the July MOU because Dudsak violated it by distributing union materials in that location. However, Gregorio conceded that at that "renegotiation" meeting the parties did not discuss the contractual access provisions of the contract or whether the Union would have continued access to the cafeteria.

Levine testified that he had not seen, nor had he been aware of the November, 2011 MOU prior to January 14, 2013 when it was attached to a document settling two grievances. Levine sated that the negotiation and execution of the November, 2011 MOU were not related to the issue of Union staff access to the Employer, visitation rights, or the Union's access to the cafeteria. He stated that the MOU was not a modification of the contract.

Rather, according to Levine, the MOU was related to the issue of where employees who are local union representatives could meet with newly hired employees. He stated that the MOU was a settlement of Dudsak's grievance and was not a change in the Union's visitation rights under the contract. According to Levine's interpretation, the MOU was meant to clarify the contract's provision that the Union could speak to employees at orientation by identifying where and when those conversations would take place. He interpreted the MOU as giving the Union the right to occupy a room for one hour in which to have a 10 minute discussion with new hires concerning the Union.

Levine stated that the MOU addresses and resolves the fact that employee Union representatives had not been able to meet with new hires at the orientation session because of conflicts with their schedules, leading to the discharge of Dudsak.

According to Levine, the resultant MOU was a compromise in which it was agreed that every other week, timed to coincide with the new hire orientations, the Union would be provided

a room where employees could obtain information which they would have received had the Union been present at the orientation.

Following the execution of the November, 2011 MOU, and until January 14, 2013, the Respondent did not interfere with the Union's meetings or other activity in the cafeteria.

On October 16, 2012, nearly one year after the November, 2011 MOU, Levine notified Pavisic that Union agents would be meeting with employees in the cafeteria to investigate grievances. Human resources agent Forsyth replied that "we are pleased to afford you the opportunity to use our cafeteria for this purpose, subject to the terms of the CBA, some of which are cited below." The cited provisions refer to Articles 4.2 and 4.4 of the contracts relating to non-interference with the work of any employee, and refraining from such activity during employees' work time.

However, only one week later, on October 23, 2012, Respondent official McVey denied the Union's request to meet with employees in the cafeteria the following day, stating that the Respondent believed that the use of the cafeteria "for these purposes interferes with the use of the cafeteria by patients, non-union staff, physicians and visitors." She stated that the Respondent would make a conference room available to the Union for this purpose, noting that the Hospital "reserves the right to reasonably limit the use of its facilities regardless of notice."

On October 24, Levine advised McVey that the Employer's denial of the use of the cafeteria violated the contract, the parties' past practice and the Act. Immediately thereafter, Union agents met with employees in the cafeteria without interference by the Respondent. Thereafter, Levine notified the Respondent several times that it would meet with employees to investigate grievances and the Respondent made no objection.

In November and December, 2012, human resources director Garrity received several notices from the Union of its intended visits to the Employer. Each mentioned that the union agents would be in the cafeteria on those dates. She replied "thank you." She did not object to union staff members being in the cafeteria on those dates.

Margaret Bachman, a Union organizer, visited the Hospital with Union representative Torrey for about one year, from October, 2012 to September, 2013. She also assisted representative Levine there in obtaining information concerning grievances.

Bachman stated that when she went to the cafeteria she was given a pass at the security desk which said "cafeteria." From about mid-October, 2012 to early January 2013, she visited the cafeteria about every two weeks, or about six times in total. Management did not express any concerns with her being in the cafeteria. In fact, during that period of time she was once directed to a second floor conference room and not the cafeteria. She told McVey, a Hospital CEO, that she had the right, under the contract, to meet in the cafeteria. McVey said that since the Union would be discussing personal issues such as grievances, she wanted to ensure that the participants had some privacy. Bachman said that she preferred to meet in the cafeteria and McVey agreed. McVey did not claim that the Union was not entitled to conduct union business in the cafeteria.

Bachman testified that the Union preferred the cafeteria because it was easier for employees to speak to Union agents in the cafeteria. The agents comported themselves in a respectful manner – they were not loud, they did not speak to patients or visitors, and the Employer made no objection to their behavior. They spoke with 12 to 14 employees in each of their visits. Thereafter, in later visits, Bachman continued to meet with employees in the cafeteria until January, 2013.

On January 10, 2013, the Respondent refused to permit laid off employee Seguinot, who was accompanied by Union agents, to enter the Hospital. Union agent Boydston advised that Seguinot was then a Union agent. The group was permitted to enter the Hospital and they sat in the cafeteria. Garrity told Seguinot that the Hospital's management did not want him on the premises.

On January 14, 2013, Levine advised the Respondent that on the following day Union staff members would be meeting in the cafeteria with members to investigate potential grievances. Garrity replied that the MOU provided that "future meetings will be held in a non-public area, a conference room, that we will reserve for you."

On January 14, upon first becoming aware of the November, 2011 MOU which Garrity was referring to, Levine wrote to the Respondent stating that the local union president was not authorized to agree to a substantive change in the "Union Visitation" provisions of the collective-bargaining agreement without the consent of HPAE State president Twomey. Levine stated that the contract is between HPAE and the Employer, and no one else was permitted to negotiate any other terms without Twomey's authorization.

In addition, Levine testified that the November, 2011 MOU was an agreement whereby the Employer withdrew its discipline of Dudsak and provided an additional room for the Union to meet with employees, and in return the Union agreed to withdraw its grievances. According to Levine, the MOU was an acknowledgment that Dudsak had the authority to resolve a grievance, but not an acknowledgement that the "Union Visitation" clause was limited by the MOU. Levine stated that that MOU did not limit the Union's contractual access rights, but rather the "designation of a meeting room" was for the purpose of providing the Union with a location to meet with new hires.

On January 14, Garrity denied the Union's request to meet in the cafeteria the following day, stating that two union representatives were permitted to meet with employees in a conference room and not the cafeteria, basing her decision on the November, 2011 MOU.

On January 22, Twomey, Seguinot and Union agent Larry Lipschultz were told by Hospital security guards that they were not allowed to enter the cafeteria. They did so anyway. Respondent's attorney Mulligan, Garrity and Dunaev approached and told them to leave. The Union group refused and remained in the cafeteria for about 1½ to 2 hours.

Garrity testified that on January 22, 2013, she entered the cafeteria with Respondent attorney Mulligan and Dunaev while Twomey was present. Garrity told Twomey that the Union was not entitled to be in the cafeteria. Dunaev told Twomey that she had not responded to her request for a meeting to discuss the Union's being able to meet in the cafeteria. Garrity said that, in the interim, she would designate the 2 West conference room or another conference rooms the place where the Union would meet.

On January 24, Garrity wrote to Twomey, advising that on January 22, the Union entered the Hospital for the purpose of speaking to its members to investigate grievances pursuant to Section 4.4 of the contract, and the Hospital reaffirms its right to do so.

The letter stated that "going forward, the hospital will permit Union representatives to exercise their rights under Section 4.4 of the CBA by utilizing a room designated by the hospital for that purpose. There is nothing in the CBA or Section 7 of the Act that designates where a meeting may take place. Consequently, the Hospital, as it is responsible for security and safety of patients, visitors and staff, will designate the meeting place. Meetings for these purposes will NOT be held in the cafeteria… although a public place, is occupied by patients, visitors,

administrators and non-Union staff. Accordingly, the conduct of business in their presence is not appropriate. By providing a private room for your meetings, we will alleviate the concerns you expressed on January 22 regarding "spying" on your activities. The Union is clearly entitled to privacy in its discussions with members and this policy will assure that this is the case. As required by the CBA, Union representatives will be required to notify Human Resources 24 hours in advance of an intended visit. Upon appearance at the hospital, representatives must identify themselves with security and demonstrate their representative status. Thereafter, they will be escorted to a room where you or they may conduct Union business."

At hearing, Garrity testified that the collective-bargaining agreement stated that the Union could meet in non-patient areas such as the employee lounge or cafeteria. She explained that the contract did not state that meetings shall be held in the cafeteria. Garrity testified that the contract was silent on the matter, or did not conclusively establish where the Union was entitled to meet. Accordingly, she concluded that the Employer was permitted to designate an area where the Union could meet with employees.

Local or State Union as the Contracting Party

Local 5147 has an executive board, a president and, for each of the bargaining units at the Respondent's facility, a vice president. Joanne Dudsak is the vice president of the nursing bargaining unit and the president of the local union.

Ann Twomey, the state president of HPAE, stated that the collective-bargaining contract is between the Employer and HPAE. She must sign the contract as an officer of HPAE. In addition, the bargaining committee members sign the contract. She stated that if the contract is modified, the same procedure applies. HPAE must approve and sign the modification.

Twomey signed each collective bargaining contact that HPAE had with employers since its inception in 1974. She reviewed the two contracts at issue here.

Levine stated that HPAE is technically a state federation of all the AFT health care local unions within New Jersey. The contracts are between the Respondent and HPAE, the state federation. The cover of the local contract book prepared for its members and intended as a handbook for the Local 5147 members, states that it is an agreement between Local 5147 HPAE and the Employer. The booklet itself contains the contract that was executed by the parties which state that it is an agreement made between the Employer and HPAE.

Levine stated that the administration of the agreement is the function of the local union, but that the local union may not change the contract itself. Although the local negotiation committee signs the contract, the agreement is not transmitted to the employer until Twomey signs it in behalf of the state organization which is the official union-party to the contract. Her signature binds the Union to the contract. Twomey signed every contract that was executed by HPAE. She signs it after the executive board approves it. The Union bylaws require the approval of the membership for it to be ratified. Levine stated that the local union participates in the negotiations for the contract, but Twomey or a staff representative is the negotiating individual.

Levine stated that the local union cannot negotiate a new contract or modifications to existing contracts. He added that the contract does not state that the local union is a party to the agreement.

Discussion

The complaint alleges that since January, 2013, the Respondent failed to continue in effect all the terms and conditions of the contracts by failing to allow Union representatives to meet with employees in the cafeteria.

The collective-bargaining agreement, as set forth above, provides that the Union has the right to visit Hospital premises to investigate grievances. The contract further provides that no union activities may occur in "patient care areas, which do not include break rooms and cafeteria."

There is no dispute that the Union agents have been permitted to use the cafeteria to meet with employees from the inception of the contract in December, 2010 until January, 2013. It is also undisputed that in January, 2013, the Union was denied the use of the cafeteria for that purpose.

I cannot accept the testimony of the Respondent's witnesses that the November, 2011 MOU was a renegotiation of the July, 2011 MOU or the main collective-bargaining agreement. The July MOU expressly reaffirms union representatives' right to meet in the cafeteria as provided in the collective-bargaining agreement.

Nor can I accept Gregorio's testimony that the November MOU was intended to, or did, in fact, restrict access of Union agents to a designated room. To agree with Gregorio would require a finding that only four months after the parties acknowledged that union activities could take place in the cafeteria, the Union then agreed to give up that right.

I reject Gregorio's testimony that the November MOU was prompted by Dudsak's distribution of union materials in the PACU. The Respondent claimed that that activity violated the contract's provision that no such activities take place in patient care areas. However, the Union's right to use the cafeteria for such purposes was completely unrelated to Dudsak's alleged activity in the PACU.

Moreover, Gregorio conceded that during the negotiation of the November MOU there was no discussion of the contractual access provisions of the contract or whether the Union would have continued access to the cafeteria.

I cannot find that in the absence of any discussion about the cafeteria in that crucial negotiation session, that the Union explicitly or impliedly relinquished its contractual right to meet with employees. Nor was the contractual provision that union activities could take place in the cafeteria altered.

I find that the negotiation and execution of the November MOU, as testified by the Union's witnesses, was nothing broader than a resolution of Dudsak's grievance and a method by which union representatives could meet with employees every other week which coincided with the Respondent's orientation sessions for new employees.

The Respondent notes in its brief that its "enforcement" of the alleged no-cafeteria agreement was "inconsistent." I do not agree. Its "enforcement" was not inconsistent. It was nonexistent.

Thus, for more than one year after the alleged "no cafeteria" agreement was executed in November, 2012, to January, 2013, the Union used the cafeteria openly and regularly to meet with employees to investigate their grievances. Its use by the Union has even been welcomed by the Respondent – thus on October 16, 2012, human resources agent Forsyth wrote that "we

are pleased to afford you the opportunity to use our cafeteria for this purpose [to meet with employees to discuss their grievances] subject to the terms of the CBA, some of which are cited below."

Moreover, for more than two three years following the execution of the collective-bargaining agreement, from December, 2010 to January, 2013, the Union has been permitted to use the cafeteria to meet with employees.

The Respondent argues that the November MOU did not modify the collective-bargaining agreement since the contract only permits the Union a "general right" to visit the Hospital for union-related business. The Respondent contends that the November MOU merely clarifies the Union's general right by stating that the Hospital will designate a plate for visitation.

I cannot agree. The Respondent argues that the MOU precludes the Union from using the cafeteria. The contract provided the Union with more than a "general right" to visit the Hospital. It expressly permits the Union to visit the Hospital to investigate grievances, and it permits union activities to be conducted in the cafeteria.

The Respondent argues that Dudsak, as the local union president, possessed actual and apparent authority to enter into the November, 2011 MOU, and it is binding on the Union. The Respondent relies on the Local's constitution and bylaws which is attached to the collective-bargaining agreement.

However, those documents provide that the president of HPAE chairs a "committee on negotiations" which prepares proposals and has authority to negotiate a contract "which it shall present for ratification to the general membership." The documents further provide that "upon reaching a tentative agreement, a general membership meeting will be scheduled" and that ratification by majority of ballots cast in favor is required to ratify any tentative agreement arrived at by the negotiations committee.

The above establishes that the November agreement reached by Dudsak was not of the type contemplated by the local union's constitution and bylaws. In contrast, the July MOU reached between Twomey and the Respondent was ratified by the membership. I cannot agree with the Respondent's argument that the speed with which Twomey agreed to the July MOU establishes that it was not ratified. No evidence was presented that it was not ratified.

Under these circumstances I cannot find that Dudsak possessed the authority, actual or apparent, to bind the Union to the November MOU which limited its specific right to meet with employees to investigate their grievances or that limited the right of its employee representatives to engage in union activities in the cafeteria.

Even assuming, arguendo, that Dudsak had the authority to execute the MOA, I find that the MOA did not serve to modify the collective-bargaining agreement. The MOA could not and did not operate to eliminate or even limit the Union's right to visit the Hospital and to engage in union activities with employees in the cafeteria.

The Respondent argues that the Union is understandably unhappy with the MOU but it must abide by it. I cannot find that the Union is bound by an agreement that it did not make. It is impossible to believe that the Union would have surrendered its right to visit the Hospital to investigate grievances or its right to have union representatives engage in union activities in the cafeteria. It is also hard to believe that the Union would have given up that right in favor of agreeing to meet in a room which could be canceled by the Respondent at any time with 30 days notice.

The Board has long held that a union's access to represented employees on an employer's premises is a mandatory subject of bargaining and that an employer's unilateral modification of contractual access provisions violates Section 8(a)(5) of the Act. *ABF Freight System, Inc.*, 325 NRLB 546, 562 (1998); *American Commercial Lines*, 291 NLRB 1066, 1072 (1988).

I find and conclude, as alleged, that the Respondent failed to continue in effect the terms and conditions of the contract by failing to permit the Union to meet employees in the Hospital's cafeteria. *Precision Anodizing & Plating*, 244 NLRB 846, 856 (1979).

In refusing the Union permission to meet with employees in the cafeteria, I find that the Respondent unlawfully modified the contracts which expressly provide that it may visit the Hospital to investigate grievances and that employees may engage in union activities in the cafeteria. Such modification of the contract was done without the Union's consent.

For the reasons set forth above I find that the Respondent did not have a sound arguable basis for believing that the contract allowed such a modification. There cannot be two different interpretations to the express language of the contract which permitted the Union to do so. The agreement which allegedly substituted a room designated by the Respondent for the use of the Union for that purpose did not serve to abrogate the express contractual provision permitting the Union to visit the Hospital to investigate grievances and which permitted employees to engage in union activities in the cafeteria.

In addition, in determining whether the Respondent had a sound arguable basis for believing that the contract could be interpreted to refuse to permit the Union to meet with employees in the cafeteria, the parties' past practice is examined as to the effectuation or implementation of the contract provision. *Kmart Corp*., 331 NLRB 362, 362 (2000).

Here, the parties' past practice for more than two years has been to permit the Union to meet with employees in the cafeteria for the purpose of investigating grievances. Moreover, in answer to the Union's request to use the cafeteria to meet with employees to investigate their grievances, Respondent's human resources agent Forsyth wrote that "we are pleased to afford you the opportunity to use our cafeteria for this purpose…."

K. Deferral to the Grievance-Arbitration Provisions of the Contracts

The Respondent argues that the following allegations of the complaint must be deferred to the grievance-arbitration provisions of the parties' contract: The alleged (a) implementation of new medical plans (b) refusal to include the RN interns in the RN unit (c) elimination of employees' 12 hour shifts (d) violation of the bumping and recall rights of service unit and technical unit employees (e) refusal to apply the Service Contract to hospital assistants and nursing assistant interns (f) layoff of fulltime employees and retention of part-time and per diem service employees and the alleged (g) refusal to allow union representatives to meet with employees in the cafeteria.

The General Counsel and Union oppose deferral. *Collyer Insulated Wire,* 192 NLRB 837 (1971) and *San Juan Bautista Medical Center*, 356 NLRB 736 (2011) set forth the standard to be used in determining whether these allegations should be deferred. They are:

> (1) whether the parties' dispute arises within the confines of a long and productive collective-bargaining relationship (2)

> there is no claim of animosity to employees' exercise of Section 7 rights (3) the parties' agreement provides for arbitration in a broad range of disputes (4) the parties' arbitration clause clearly encompasses the dispute at issue (5) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute and (6) the dispute is well suited to resolution by arbitration.

Here, the parties have not had a long and productive collective-bargaining relationship. They have had only one contract which has been fraught with numerous disputes. The Respondent argues that it and the Union "have maintained robust and satisfactory grievance and arbitration procedures throughout their relationship, processing more than 44 grievances." (Brief, p. 92) I agree that the procedure has been robust. But it has not been satisfactory. At the time of the hearing, the parties' relationship has been "contentious … characterized by disagreements and legal wrangling…." *San Juan Bautista Medical Center*, above, at 737.

The fact that more than 44 grievances were filed does not necessarily show that the grievance procedure was working. Rather, it may show a highly fractious relationship that required extensive use of the grievance machinery.

There has been a claim, indeed allegations and findings here of employer animosity to employees' exercise of Section 7 rights. I have found, above, that Dr. Lipsky threatened the Union that the parties would not reach agreement if the Union did not cease its media campaign. The fact that I did not find a violation in that remark because no employee was present to hear it does not negate the fact that the comment was made. This supports a finding that there is animosity to employees' exercise of their Section 7 rights. Additional support for that finding is Dunaev's threat to close the Rehab Center if the Union held a press conference.

I agree that the contract's broad grievance-arbitration provision provides for a broad range of disputes and also clearly encompasses all of the disputes at issue. I also find that the Respondent urged in its answer to the complaint that the Board must defer to the grievance provisions of the contract as to any alleged violation which is "currently subject to the grievance process." Further, In its brief the Respondent offered to waive the issue of the timeliness of any grievance which may be filed.

In determining whether these matters should be deferred to the grievance machinery of the contract, it is important to note that I have found, above, that the Respondent modified its contract by unlawfully refusing to permit the Union its contractual right to meet with employees to investigate grievances. The cafeteria was a place designated in the contract where union activities was permitted. Meeting with employees for the purpose of discussing grievances is a fundamental right which goes directly to the issue of whether these matters should be deferred to the parties' grievance machinery.

There was a past practice pursuant to which the Union met with employees in the cafeteria to investigate their grievances. Respondent did not honor that past practice. Nor, by refusing to honor that past practice did the Respondent honor its contractual commitment which permitted employees to engage in union activities in the cafeteria.

Instead, the Respondent attempted to prove that it had entered into an agreement with the Union, through Dudsak, in which the Union surrendered that right and instead agreed to meet with employees in a room designated by the Respondent.

The contract placed no limitation on the number of times the Union could utilize the cafeteria to investigate grievances, or the amount of time it could spend there, or the number of employees who could be present.

In marked contrast, the alleged agreement limited the Union's meeting with employees to (a) every other week (b) for one hour (c) with no more than two employees present at the same time and (d) specified that the Respondent had the sole right to cancel the use of the room at any time upon 30 days notice.

Under these circumstances, particularly where there is evidence that the Respondent unlawfully limited the Union's efforts to discuss grievances with employees, I find that the Respondent rejected a fundamental element of the grievance process – the ability of the Union to investigate the grievances of employees.

Accordingly, I cannot find that these disputes should be deferred to the grievance-arbitration provisions of the parties' contracts.

L. The No-Strike Clause

The Respondent's affirmative defense alleges that the Union engaged in economic pressure activity conduct which violated the no-strike clause of the parties' contracts. It further argues that such breach of contract permitted it to refuse to bargain with the Union. It asserts that, based on this defense, each refusal to bargain allegation of the complaint must be dismissed.

The clause states as follows:

Article 7. Strikes & Lockouts – Section 7

> 7.1 During the term of this Agreement there shall be no strikes, sympathy strikes boycotts, picketing, work stoppages, slowdowns, sit-ins, other interference with the operations of the Hospital , or other economic pressure activity by the Union or any employee covered by this Agreement. A threat to commit any of the above acts shall be considered a violation of this article.
>
> 7.2. During the term of this agreement there shall be no lockouts by the employer of its employees covered by this Agreement.
>
> 7.3 The Employer shall have the right to maintain an action for damages resulting from the Union's violation of this Article. Any claim by the Employer for damages resulting from any violation of this Article shall not be subject to the grievance and arbitration provision of this Agreement. While disciplinary action taken against employees for violating this Article or any other provision of this Agreement is subject to the grievance clause hereof, the Employer is entitled to seek injunctive relief against a strike in violation of this Article pending the decision of an arbitrator. Grievances over disciplinary action taken against employees found to have violated this Article shall be limited to the issue of whether or not the employee in question actually engaged in the prohibited activity. If the Arbitrator determines that an employee engaged in activity prohibited under this Article, any disciplinary

> measures taken by the employer against the employee must be left unmitigated.
>
> Any individual employee who violates this section will be subject to immediate discharge.

I stated during the hearing that this issue would be analyzed as follows: First, whether the Union engaged in communications which constituted economic pressure activity. Second, assuming that the Union engaged in economic pressure activity, whether such conduct breached the no-strike clause of the parties' contract. Third, assuming the contract was breached whether such a breach permitted the Respondent to refuse to bargain with the Union.

In its brief the Respondent asserts that because of the Union's breach of the no-strike clause it was privileged to refuse to bargain with the Union as to each Section 8(a)(5) complaint allegation and asks that each of those allegations be dismissed on that ground.

In view of my decision finding that that the Union did not engage in any economic pressure activity, I find that there was no breach of the no-strike clause. I therefore reject the Respondent's argument and request that the 8(a)(5) allegations of the complaint be dismissed.

1. The Board's Order on the Respondent's Request for Special Permission to Appeal

In seeking to prove its affirmative defense concerning the no-strike clause, extensive testimony was adduced by the Respondent from the Union's witnesses and from its own witnesses. In addition, the Respondent subpoenaed numerous documents from the Union and from third-parties. Pursuant to the subpoenas, the Union and third-parties produced a large number of documents. At hearing the Respondent offered and I received those documents in evidence.

Following the receipt in evidence of those documents I ruled that further documents would be cumulative and duplicative and granted certain petitions to revoke the subpoenas.

On May 24, 2016, the Respondent filed a Request for Special Permission to Appeal my Orders of March11, March 28, April 22, and May 5, 2016.

On August 22, 2016, the Board issued its Order.[8] The Board denied the Respondent's request for permission to appeal my Orders of March 11, 2016, April 22, 2016, and two Orders issued on May 5, 2016.[9]

However, the Board granted the Respondent's request for permission to appeal my March 28, 2016 Oder on the Privilege Log in which I ruled that the Union's communications with attorney Kenneth Pringle were privileged by the attorney-client privilege. The Board directed that I provide a "more detailed rationale, based on record evidence, for finding that certain documents related to the Union's communications with attorney Kenneth Pringle are privileged based on attorney-client privilege."

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[8] I have received the Board's Order as Joint Exhibit 2.

[9] The Board permitted the Respondent to renew its arguments in exceptions to my Decision.

The Union produced, in redacted form, documents Bate stamped 430 and 431 which are the documents at issue. As redacted, they were provided to the Respondent. The documents are dated January 5, 2011 and comprise one email from Pringle to Twomey, one email sent in response from Twomey to Pringle, and a third, from Pringle to Twomey.

I originally ruled in my Order on Privilege Log dated Mach 11, 2016, that those documents were not privileged by the attorney-client privilege. I gave the Union additional time to establish that the documents were privileged.

On March 28, 2016, I issued an Order Revising March 11, 2016 Order on Privilege Log. In that Order I stated that on March 25, the Union provided sufficient evidence that the documents were privileged, and I held that they were privileged form disclosure.

The evidence that I received was a letter dated March 25, 2016 from Union's counsel which included an Agreement to Provide Legal Services dated August 9, 2012 between the Union and attorney Pringle's law firm. The Agreement related to the subject of the redacted communications.

The Union's counsel's letter contained legal argument with case citations, as follows:

(a) A pre-retainer consultation by a prospective client with a view to retention of the lawyer, although it does not constitute an express attorney-client relationship, nevertheless constitutes a fiduciary obligation or an implied professional relation. The "professional relationship for purposes of the privilege for attorney-client communications "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." *Westinghouse Elec. Corp. v. Kerr-McGee Corp*., 580 F.2d 1311, 1319–20 (11th Cir. 1978).

(b) Where the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case, then an attorney-client relationship is created. 'An attorney-client relationship need not rest on an express contract. An attorney-client relationship may be implied when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.' ... Such a relationship may be established through preliminary consultations, even though the attorney is never formally retained and the client pays no fee. *Herbert v. Haytaian, 678 A.2d 1183, 1187–88*, 292 N.J.Super. 426, 435 (1996).

The Union also argued, and supplied legal citations for the proposition that the redacted communications constituted attorney work product, and also that the subject matter of the redacted communications has no bearing on the Respondent's affirmative defense, but rather related to the Union's support of New Jersey Senate Bill 1468.

Based on my review of unredacted documents 430 and 431 and the arguments made by the Union, I found that those documents are privileged attorney-client documents. I therefore reaffirm my ruling that the communications to and from attorney Pringle were privileged pursuant to the attorney-client privilege and are privileged from disclosure.

2. The Respondent's Motion to Dismiss

On May 11, 2016, the Respondent moved that I dismiss the complaint, in part, based on a statement I made in my Order dated April 22, 2016.[10] In that Order I inadvertently misquoted a comment by the Board in its February 27, 2014 Order.

In its Order, the Board stated that there was "no dispute that the Union did engage in such communications" referring to the union's public criticisms of the Respondent in the media, online, and before governmental agencies.

In stating in my April 22 Order that further evidence from non-parties would be cumulative and duplicative, I misquoted the Board's February 27, 2014 Order by stating that "there is no dispute that the Union did engage in [economic pressure activities]."

In the immediately preceding sentence I posed the question before me:

"[W]hether economic pressure activity occurred, whether that alleged activity breached the parties' no-strike clause, and whether the alleged breach permitted the Respondent to refuse to bargain with the Union."

The Respondent moves to dismiss all the Section 8(a)(5) allegations on the ground that in my April 22, 2016 Order I ruled that the Union engaged in economic pressure activity. I did not.

There is no dispute that the Union had engaged in the type of communications referred to by the Board. But there certainly has been a lengthy dispute as to whether it engaged in economic pressure activity. As I stated in the same April 22, 2016 Order and during the hearing, the question must be analyzed in three stages: whether economic pressure activity occurred, whether that alleged activity breached the parties' no-strike clause, and whether the alleged breach permitted the Respondent to refuse to bargain with the Union.

I inadvertently, inaccurately misquoted the Board's comment. The quote should have read that the Board stated that there was "no dispute that the Union did engage in such communications." Inasmuch as I did not rule that the Union engaged in economic pressure activity, the Respondent's Motion to Dismiss is denied.

3. The Facts Related to the No-Strike Clause

Ann Twomey, the Union's president, testified that in negotiations with the Respondent after its purchase of the hospital, the Union proposed that the contract with Liberty, including the no-strike clause, be adopted by the Respondent. She conceded that the expectation of the parties in agreeing to Section 7 was that neither party would engage in any of the activity set forth in that section.

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[10] On August 22, 2016 the Board denied the Respondent's request for special permission to appeal my Order dated April 22, 2016.

In contrast, Dr. Lipsky testified that the Respondent proposed Section 7.1, but conceding that the "verbiage" may have been inserted by the Union, but it was the Hospital's "clear intent" to enter into negotiations for a peaceful, fruitful, cooperative relationship with the Union.

Twomey stated that the Union did not intend to waive its right to contact the media, work with community groups or engage in any of the other activity undertaken by the Union to enforce its contract. She also stated that it was not her intent when negotiating the contract that the term "economic pressure activity" would include the activities, described below, that the Union engaged in.

4. The Union's Relation to Various Entities

As testified by Twomey, the Union's office includes a public policy group to help create positions in areas of public interest, public policy, legislation and political activity. She conceded that the Union has lobbied for and encouraged legislatures to enact certain laws which could affect the Respondent. She further admitted that the Union has also been involved in the community and the press to generate publicity concerning issues and disputes the Union had with the Respondent.

Twomey further conceded that the Union also works with various community advocacy groups regarding specific issues and disputes the Union had with the Respondent.

Twomey stated that the Union engaged in certain activities, outlined below, not to put economic pressure on the Respondent, but to attempt to ensure the Hospital's survival and to have it comply with the agreement it made with the Union. She stated that based on the few financial documents the Hospital has provided, it appeared that the Respondent was making a profit but nurses reported that supplies available to them have been reduced, DOH regulations concerning cleanliness are not being followed, and employees have been laid off and their schedules have been reduced. She concluded that such actions had a detrimental effect on the quality of patient care that the staff must provide.

Twomey added that is has always been in the best interest of the Union and its members to "made sure that this hospital is financially sound."

Accordingly, uncertain whether the Respondent's profits are being applied to its health care obligations, Twomey sought to determine whether the Respondent is financially able to fulfill its obligations to its patients, staff and the community in the provision of health care services. It engaged in efforts with the various groups to ensure that it was able to do so.

Twomey stated that the Union's efforts were meant to pressure the Respondent to meet its contractual agreements, arguing that the Hospital's alleged unilateral elimination of health insurance was an example of its failure to do so. She testified that he Union has been "pushing" to have its labor disputes resolved through the Board, the DOH to enforce its regulations, the Attorney General's office to enforce New Jersey's laws, and through the grievance procedure which has been "ignored" by the Respondent.

Twomey and Harriet Rubenstein, the Union's public policy staff person, denied that the Union encouraged the Respondent's employees not to use the Hospital's services, nor caused employees to discourage others from using such services. Nor was there any evidence that the Union did so.

Rubenstein conceded that the prior three years encompassed a series of disputes or disagreements between the Union and the Hospital. However, she noted that her research during that time did not delve to a greater degree on the Respondent, nor was it of a different

nature than her research into any other hospital. Nevertheless, she conceded that she probably did not inquire as to whether the owners of other hospitals were divorced from their spouses, as she did with Dr. Lipsky.

Rubenstein stated that the purpose of her research was twofold: to ensure that the DOH was acting properly in its oversight of the Hospital, and that the Hospital was complying with the parties' contract and state and federal laws. The Union was concerned that the Respondent's alleged failures may have some effect on the financial stability of the Hospital, the jobs of its members, and the ability of the community to have access to care.

Accordingly, Rubenstein testified that the Union sought to obtain a "fuller understanding" of who the Hospital's owners and investors were, and whether the Hospital's funds were being "diverted" to those investors who had a "bad track record." The Union sought to determine whether there was a relation between those circumstances and the alleged violations of the contract – the bouncing of employees' paychecks, the failure to pay employees' medical insurance bills, and the lack of sufficient equipment for use by the Hospital's staff.

JeanneMarie Otersen, the Union's chief of staff involved with the Union's public policy positions, oversees the Union's legislative efforts and worked with community organizations and publicity. She stated that the Union worked with advocacy groups which share the Union's concern for quality patient care, services and staffing, and its efforts to "save" a hospital which the Union believed was in financial difficulty. She added that the Union worked extensively by advocating with the DOH. Otersen did not recall any instance where the Union asked an advocacy group to support the Union in a dispute with the Respondent concerning its contract.

Otersen stated that the Union's public policy work included developing policies or laws regarding patient and worker safety, and working with community organizations and others who shared those goals.

Otersen testified that from the time the Respondent purchased the hospital in December, 2010 though late 2013, she did not ask the Union's researchers to "dig up" negative information on the Respondent or its owners. Rather, she told them to look at the Hospital and its finances so that the Union could protect the employees, patient care and the Hospital. She asked them to examine whatever they could find regarding the Hospital and its owners as the fiduciary holders of the facility.

Otersen conceded, as shown below, that when the Union learned of negative or critical information concerning the Hospital or its owners, she occasionally shared such data with reporters, community groups, legislators, government agencies, and with the public through the Union's website. Indeed, Otersen admitted that the Union occasionally gave negative, but truthful information to those groups concerning the Respondent. She conceded that truthful information could reflect poorly on the Hospital.

Harriet Rubenstein, the Union's public policy staff person, advocated in behalf of the Union with the DOH and other state agencies. She stated that it was the Union's practice to research the various hospitals with which the Union has contracts with respect to their finances, track records with regulatory agencies, union histories, and the compensation given to their executives.

Such research includes an analysis of the hospital's audited financial reports when they are available and their track record with the DOH including their reports to that agency and the Attorney General's office. The Union also researches the owners' backgrounds, their track records at other health care institutions, other businesses they were involved with and lawsuits filed against them.

5. Contacts with Reporters and Newspaper Articles

Numerous articles which appeared in local newspapers were placed on the Union's website which is accessible by the public, which of course includes Union members, patients and their families.

Newspaper articles published on the Union's website were received in evidence. Dunaev stated that, although they constituted "negative publicity" they were "truthful."

Twomey maintained that a newspaper article is not critical if it states the facts or the truth of a particular matter. An article referring to the Respondent bearing the headline "failure of oversight put profits before patients at a community hospital" appeared in the Union's website. She stated that the headline was not, in and of itself, critical of the Respondent. Rather, the "failure of oversight" was a criticism of the DOH for not properly overseeing the Respondent's operations.

Twomey conceded having direct contact with newspaper reporters and that the Union occasionally issues press releases which are sent to them. Further, at times, the Union sends information concerning the Respondent to reporters. For example, there was an exchange between Twomey and reporter Lindy Washburn concerning the sale/leaseback of the Respondent's property in which the Respondent sold the land under the hospital to a purchaser and then leased the land from that purchaser. The Union, believing that the transaction was "secretive," was concerned about the future of the Hospital and its members. It questioned the length of the lease and its terms and whether the Respondent's financial obligation under the lease was prohibitive. Twomey stated that it was not unusual for the Union to provide information, whether solicited or unsolicited, to newspaper reporters.

The Union sent its report and appraisal of the transaction, which it termed "opaque," to reporter Washburn but denied that it was a negative report . Rather, it was an account of what had occurred. However, Twomey conceded that "opaque," meaning less than transparent, could be considered a negative characterization of the transaction.

A newspaper article concerning the Union's press release stated that "since taking over the Hospital, the for-profit owners have consistently violated the rights of nurses and other healthcare employees…." Twomey stated that the purpose of the press release was "advisory" – as background regarding what the Union considered to be violations of employees' rights. The Respondent argued that the article shows that the Union appealed to the public and the media in an effort to publicize its labor dispute which constituted an attempt to put economic pressure on the Hospital.

Rubenstein stated that when she provided information to reporters she did so when she knew that the data was accurate. The Union researched an individual's legal problems in Florida. The individual's company grew and sold marijuana and had some connection with an owner of the Respondent who was an officer of the Florida company.

Otersen and Harriet Rubenstein exchanged emails concerning Dr. Lipsky's activities outside the Respondent. For example, Otersen asked Rubenstein whether the Union should "weigh in" on Dr. Lipsky's proposal to treat autism which Rubenstein called "creepy." Rubenstein suggested to Otersen that the Union could contact autism support groups mentioned in a news article about the proposal or send a letter to the DOH opposing approval of the program. However, Otersen stated that the Union did not take any action concerning Dr. Lipsky's proposed program.

Otersen received a note from a reporter asking whether she knew that Dr. Lipsky did not have a medical license. Otersen replied that the Union knew that. Otersen received an email from a reporter advising that she intended to "dig deeply" as to Dr. Lipsky and Dunaev. Otersen did not know why the reporter intended to do that. Otersen forwarded it to Smith and Rubenstein. Otersen also received an email from Rubenstein informing her and the reporter that she (Rubenstein) would send the reporter what the Union "has on" Dr. Lipsky and Dunaev.

The Union suggested a "potential quote" concerning advocacy group New Jersey Appleseed's (NJA) warning to the State at the time it approved the transfer of the hospital to the Respondent, that the Respondent's "track record" showed that "quality safety and access to needed hospital services were at great risk." Despite the fact that Rubenstein had remarked "brilliant" in July, 2012, Otersen stated that at the time of NJA's warning, in December, 2010, the Union did not agree with the position of NJA, had supported the Respondent's purchase of the hospital, and she did not know if the potential quote was published.

Rubenstein testified that in about 2008, a law was passed, which the Union strongly supported, which authorized the DOH to appoint a monitor when it determined that a hospital is in "financial distress." Following the appointment of Executive Resources as the financial monitor to oversee the Hospital's finances, Otersen wrote to four reporters that the Union has been asking for an independent monitor to ensure that the Respondent's operations would continue to be viable. The Union supported the appointment of Executive Resources but wanted that company to be independent of the Hospital and that its reports be made public. Through its research the Union learned that Executive Resources may have had a conflict of interest in acting as the monitor and brought this to the attention of the press. It was Otersen's view that she should provide the press with the information the Union had, and it was the reporters' decision to publish the information or not. Otersen stated that the Union provided the press with the information it obtained but did not want the information published to be attributed to the union.

Rubenstein stated that in October, 2008, Chris Manthy, a Union researcher, forwarded an Indiana state news article which reported that a judgment had been rendered against certain individuals who later invested in the Hospital.

6. Contacts with Government Agencies

The Union made many requests for information pursuant to the New Jersey Open Public Records Act (OPRA) to the New Jersey DOH. Dr. Lipsky conceded that any member of the public may make an OPRA request.

Twomey wrote to various governmental agencies regarding information concerning the Respondent. For example, she wrote to the Commissioner of the Department of Banking and Insurance (DOBI) asking that it revoke the registration of the healthcare trust of TruPlan which was the health plan implemented by the Respondent after its elimination of MagnaCare, the original health plan for the employees. The Union believed that TruPlan was inferior to the health plan provided for in the parties' contract.

Dunaev stated that the Union's grievance concerning the implementation of TruPlan, a Multiple Employer Arrangement Plan (MEWA) should have been the Union's only recourse regarding this matter. She stated that the Union should not have sought the intervention of the DOH. She further asserted that the Union exerted economic pressure on the Hospital by contacting the DOBI concerning the matter.

Twomey also wrote to the New Jersey Department of Health and Social Services (NJDHSS), noting that the Respondent's "repeated violations of state and federal laws and

regulations and a business model that appears to place their own profits ahead of their financial obligations to creditors, vendors and employees, with what we believe are potentially dangerous consequences for patient care" require it to appoint a temporary manager.

Dunaev stated that the Union violated the contract by complaining about the Hospital to the DOH which resulted in inspections of the Hospital.

On August 27, 2012, Rubenstein sent an email to Otersen objecting to the DOH's approval of the Respondent's application to operate an ambulance service. In addition, the Union examined the operation of two ambulatory service centers to learn whether the owners of those facilities had "ties" with the Respondent's owner. In this respect, Rubenstein stated that its research into those facilities was related to the oversight provided by the DOH of New Jersey health care facilities.

In December, 2012, an email was sent by the Union to the "Meadowlands Staff" complaining that the DOH issued or renewed the Hospital's license without a regulatory compliance statement as required by state law. In her email, Rubenstein sought advice as to how "best to use" the Respondent's "failure" to obtain that license.

In this respect, Rubenstein stated that her purpose in "going after" the DOH by advocating for hearings and legislation was to highlight the failure of DOH to exercise proper oversight. In addition, the Union sought to use the DOH's alleged failure to request that it appoint a monitor at the Hospital. Her email also noted that the Union "can't wait to hit them with the ERISA suit" – a reference to the lawsuit it filed for the Respondent's nonpayment of its members' medical bills pursuant to its insurance plan.

In October, 2012, Union researcher Manthy reported to Rubenstein and Otersen that he learned from an Indiana police investigator that investors in the Respondent may have been involved in an alleged improper financial arrangement. Manthy told the two women that the "best way to get them is via the criminal law" and suggested that this report may be appropriate for a news story.

7. Contacts with Legislators and Efforts to Obtain Legislation

Twomey stated that she met with legislators in an effort to have them propose or enact legislation which would place operational and financial controls on the Respondent. The Union sought legislation which would provide greater transparency of the financing for all hospitals which receive public money. She described such transparency as the means to provide the disclosure of information and the submission of reports on a regular basis.

Twomey conceded that if a law was passed requiring the Respondent to provide the Union with certain information, the data so obtained would help the Union's labor relations objectives such as staffing. However, she maintained that urging legislation which would help the Union in its disputes with the Respondent did not constitute economic pressure activity.

She defined economic pressure, as it relates to the parties' contract, as such activity which is meant to have some direct impact on the Respondent's economy. The General Counsel conceded that if legislation required additional reporting by the Respondent, it would incur more costs, but denied that such added cost was caused by the Union.

The Union had asked for a financial monitor, and then a financial manager to be appointed by the Respondent because it had allegedly been delinquent in providing financial information to the DOL and to the Attorney General's office. Advocacy group NJA also asked for the appointment of a temporary manger.

Further, the Union sought a monitor and then a manager because it was concerned about the Hospital's financial stability, and believed that, based on financial information it received, the Hospital was not being operated adequately and safely for its patients and employees, that its owners were receiving an excessive amount of distributions of profits while at the same time layoffs of employees took place, and workers had an insufficient amount of equipment to work with.

Otersen stated that the Union's interest in advocating for a financial monitor was to ensure the Hospital's continuation in business, not to put economic pressure on it. Otersen further stated that an article in the Union's website referred to a New Jersey law which permits the appointment of a monitor when certain "triggers" are met. "She stated that such triggers included the Respondent's financial distress and defaults on its loans in 2011, and its 2011 audited financial statement.

In this regard, Twomey issued a press release calling for the hire of someone who would conduct an independent review of the Respondent's financial statements, stating that the Respondent "has consistently refused to comply with the requirements of New Jersey and federal law."

As a basis for making those comments, Twomey cited that documents she received showed that the Respondent failed to pay proper state taxes on behalf of its employees and incurred more than $4 million in federal tax liens because of its failure to make payroll taxes to the U.S. Government.

Twomey stated that the press release was designed to alert the press regarding certain issues at the Respondent, and to give the Union's reason for asking for financial oversight as a result of its members' payroll checks being bounced when they tried to cash them.

Twomey stated that the proposed bill was directed at the Respondent but also at other for-profit hospitals. She believed that profits were being removed from the Hospital and that the resources within it were dwindling.

In January, 2011, a news report on the passage of the bill to require for-profit hospitals to disclose financial information to the public quoted the Union as saying that the law was passed "in response to concerns raised about whether public health care funds are diverted to finance excessive executive compensation, insider dealing with board members or affiliates or excessive profits at for-profit owners of community hospitals." Twomey was quoted as saying that "we've already seen examples where partners take millions in profits and fees while laying off staff and cutting services; where owners make large and secret contributions to lobbying efforts and where companies conduct lucrative dealings with their own affiliates. We applaud the NJ Senate vote to begin to impose responsible transparency and accountability requirements on for-profits." Twomey testified that her comments did not relate only to the Respondent.

In order to show that the press release was not designed to place economic pressure on the Respondent, Twomey noted that she spoke in favor of the purchase of the Hospital prior to its purchase in December, 2010, and the press release was made only one month later in January, 2011. She testified that, as of January, 2011, the Union had not come to the conclusion that the Respondent was acting improperly as suggested in the article. However, she conceded that the article referred to the Respondent but that nothing in the article refers to it specifically.

Rubenstein stated that in 2010 the Union advocated for legislation requiring for-profit hospitals to report their financial data. The bill, entitled "Requires for-profit hospital to report certain information to the Department of Health and Human Services" was introduced on

February 22, 2010. The Hospital was purchased by the Respondent ten months later, on December 7, 2010.

A potential or actual press statement from New Jersey Senate President Steve Sweeney and Senate Majority Leader Loretta Weinberg stated that they "support … the health care workers at Meadowlands Hospital in your fight for fair treatment as you do your jobs treating and caring for the ill." Otersen stated that the message of fair treatment of employees is a message that the Union combined with safe patient care at the Respondent and at other hospitals.

Prior to a meeting with New Jersey Senator Vitale, Otersen asked whether a representative from the DOBI should be present at the meeting. A DOBI agent did not attend the meeting, the purpose of which was to learn about the relationship between Veritas and the Respondent.

In September, 2012, Otersen arranged a meeting with certain people including a member of the staff of Senator Vitale. The purpose of the meeting was to share data with them concerning their information and hers concerning her compiling of statistics concerning admission/charges at for-profit hospitals including the Respondent.

In March, 2013, Otersen sent an email to certain senators. The Union sought to make known the fact that the Respondent had tax liens imposed due to the alleged nonpayment of payroll taxes which the Union believed raised a concern about its financial viability and the lack of DOH oversight into its operations. The Union sent such information to reporters.

8. Contacts with Advocacy Groups

The Union is an affiliate member of New Jersey Citizens Action (NJCA), a statewide grassroots organization which advocates for economic and social justice. Twomey is a trustee and Otersen is an alternate trustee on the NJCA board.

In 2012, NJCA conducted canvassing by distributing flyers door-to-door in the town of Secaucus, NJ, the township in which the Hospital is located.

In the past, the Union paid NJCA to perform services of this type but Twomey did not recall if the Union paid NJCA for this particular canvassing. The literature distributed to town residents concerned a petition signed by 1700 citizens directed to the DOH which supported the appointment of a monitor to oversee the quality of care and safety of patients, and the Hospital's financial stability. Twomey believed that the Union supplied the information contained in its website posting that the Hospital's owners made numerous changes in violation of the conditions to which it agreed concerning the discharge of nurses, technicians and dietary and other support staff.

New Jersey Appleseed (NJA) is a public interest law center having joint concerns with the Union with which it has been involved for years. NJA and its executive director, Renee Steinhagen, an attorney, represent the Union in certain efforts both organizations support. For example, in 2012, Steinhagen represented the Union regarding its request for the DOH to oversee the Hospital's finances, and NJA asked the commissioner of the DOH to place a temporary manager at the Hospital. Twomey noted that NJA requested this measure on its own and on behalf of the Union.

Twomey stated, in relation to this request, that in view of the "repeated failure" of the Hospital to disclose its financial information as required under the Community Healthcare Assets Protection Act (CHAPA) there was some concern as to the Hospital's financial soundness.[11] The Union believed that it was in its interest to ensure that the Hospital was financially stable so that its members would retain their jobs. Twomey stated that, thereafter, NJA and Senator Vitale requested that a manager, and not a monitor, be hired. The Union supported that request. Twomey stated that NJA was involved in the passage of CHAPA and that one of its programs is to ensure that a non-profit hospital which becomes a for-profit hospital meets the needs of its community and the standards of licensure.

Between 2010 and 2013, NJA represented several organizations including the Union before the Attorney General in CHAPA lawsuits. Otersen did not know if the Union paid NJA for such representation.

Twomey stated that the Union is not involved with the Insurance Council of New Jersey (ICNJ). Nevertheless, an agent of that organization asked Otersen whether she knew that Dr. Lipsky did not have a medical license. Otersen responded that she was aware that he had no license. Apparently the concern of ICNJ was whether a chief operating officer of a hospital must have a medical license, and ICNJ was then involved in an insurance dispute with the Respondent.

Twomey stated that the Union met with Ward Sanders, an official from the New Jersey Association of Health Plans (NJAHP). At that meeting, according to Otersen, she gave certain documents to Sanders which she obtained pursuant to an OPRA request. The information concerned the Respondent's inpatient utility. Otersen noted that whatever information she obtained was received from the Hospital's reports it obtained through OPRA requests or from documents publicly available.

Otersen also provided copes of the Respondent's balance sheet and income statement to those at the meeting because they were attempting to "gain a complete understanding" of the Respondent's finances. David Knowlton, who was present, was a former assistant commissioner of the DOH who could be expected to understand the "true financial picture" of the Respondent because of a "real concern of the future viability" of the facility.

Otersen stated that at the meeting she stressed the need for more scrutiny and oversight from the DOH and for a better understanding of the facts the Union had. She believed that Knowlton could help the participants more fully understand the authority of the DOH. Otersen emphasized that the purpose of the meeting was not to communicate negative facts regarding the Respondent.

Rubenstein stated that the purpose of the meeting was the Union's concern for the DOH's weak oversight of for-profit hospitals. The discussion concerned the financial stability of such hospitals. She specifically advised that the Union has been doing some "number crunching – with admissions/charges at for-profit hospitals, and of course, in particular at Meadowlands. I'd like to have a meeting to share our data and see what others have that might be of use."

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[11] CHAPA is the law that regulates the transfer of a non-profit hospital to a for-profit hospital. Its purpose, according to Rubenstein, is to ensure that the sale is in the public interest as determined by the state attorney general.

Following the meeting, in an email to the meeting's participants, Sanders related that the Union gave examples of "intimidation and a hostile work environment" at the Respondent's facility. Otersen testified that she did not recall any such examples given. She noted that the Union attempted to have the DOH examine the Respondent's operations as it sought the same scrutiny of other hospitals, in order to ensure the safety of its employees and patients.

Otersen sent a note to reporters that the Respondent was fined $31,000 which included a quote which she said should be attributed to Twomey. The quote was that the fines were an "indicator that the DOH takes seriously the concerns over the hospital's financial operations and future solvency. Outstanding lawsuits by vendors, insurance companies, employees and whistleblowers, and the current NLRB trial, however call for more action, and we again urge that an independent manager be installed at the hospital to protect this community hospital."

Otersen asked the Union's researcher to examine the Hospital's same day surgery visits from 2010 to 2011 as compared to other hospitals. He did so in order to understand the financial condition of the Respondent so that the Union could be assured that it would be an economically viable institution.

Otersen asked NJCA to send a letter to NJCA members who are residents of Secaucus asking them to request the appointment of a financial monitor. The letter contained an editorial from a New Jersey newspaper. She did not recall whether the letter and email were sent.

Otersen stated that she wrote to New Jersey Health Care Quality Insurance (NJHCQI) which provides information and analysis regarding hospitals' health care utilization, quality of care and financial data, giving her personal opinion that MEWA was a "horrible idea." At that time she believed that it limited Union members to their employer's health insurance providers and their networks.

NJHCQI asked Otersen to arrange a meeting with Knowlton and Jeff Brown in October, 2013 to discuss MEWA. The purpose of the meeting was to educate Otersen as to the operation of MEWA. She was concerned as to how the change from the health plan provided in the contract to a MEWA plan would affect the Hospital's employees' health coverage. As noted, above, seven months before, Otersen expressed her view that MEWA was a "horrible idea."

Dunaev testified that the Union's relationship with NJHCQI was a "form of economic pressure" on the Hospital since the Union's leadership exclusively discussed the Hospital with that organization in an effort to create negative publicity. She stated that negative comments concerning the Respondent were made in the media. Significantly, Dunaev stated that the statements on the Union's website were truthful but constituted negative publicity.

9. Demonstrations and Press Conferences

On February 20, 2013 a "vigil," a public demonstration, was held on the street near the Hospital, but not in the view of the Hospital or directly in front of it. Levine stated that it took place across the street from the Hospital across several lanes of traffic from the Respondent. No horns were utilized and only one or two placards were displayed which identified the Union and why it was present. No vehicles were prevented from entering the Hospital's premises. The participants did not picket the Hospital's premises. There was no picketing, chanting or speeches. Twomey stated that the vigil was not intended to disrupt hospital operations.

Twomey stated that the purpose of the vigil was a show of support by Union members employed at other hospitals for the Respondent's nurses who experienced a difficult work environment. She stated that the nurses felt intimidated if they expressed support for the Union, believing that they may suffer reprisals for doing so.

Twomey conceded that certain alleged unilateral actions by the Respondent were grieved by the Union, thereby supporting the nurses' but believed that the vigil was necessary because the Hospital refused to conduct the grievance meetings properly and the Respondent did not respond with a decision made on a grievance. As to this point, Twomey conceded that Dunaev asked to meet with her, complaining that information on the Union's website was inaccurate. Twomey replied, asking what, specifically, was inaccurate. No response was received by Twomey.

In this respect, Dunaev testified that she received Twomey's letter asking for specific inaccurate information and she did not reply because, in addition to being a "slap in the face," it was obvious to her that Twomey was not interested in speaking to her or resolving the differences between them.

On October 2, the Union held a press conference in which it stated that it would release a list of labor violations. Those included charges filed with the Board and the actions requested of the Board. The Union released its "white paper" at the press conference. Certain statements from senators were distributed as part of the press materials at the conference.

The conference was supposed to be held on public property but because of inclement weather it was held in a hotel near the Hospital.

10. The Respondent's Evidence

Dunaev testified that the Union "continuously" engaged in economic pressure activity in violation of Section 7.1 of the contract by contacting the public, the media, the state legislature, and various government agencies which regulate the Respondent's operations, and by creating negative publicity for the Hospital, by which it intentionally damaged it.

It must be repeated that Dunaev testified that the Union's publicity, as posted on its website, was negative but truthful.

She stated that these contacts exerted economic pressure on the Hospital and made it very difficult to conduct its normal business operations. Such pressure caused a decrease in the Hospital's census of patients. She gave as an example, without details, that when placed in an ambulance upon an emergency, patients refused to be transported to the Hospital. She further stated without detail that outstanding nurses left their employ because of the media portrayal of the Respondent, and that hiring was also difficult because of the publicity.

Dunaev conceded, however, that she had no evidence that any specific patient did not use the Hospital's services because of the Union's economic pressure activity, nor did she know of any nurses who quit because of such activity, or that, in fact, the Union caused employees to discourage others from applying for employment at the Hospital, or that the Union discouraged the Hospital's employees from using its services.

Dunaev also stated that when the Union gave information to the advocacy groups, negative publicity was thereby created as those groups made negative comments in the media, making it very difficult to have a productive relationship with those organizations.

Dunaev stated that the Hospital had problems with Cigna, Aetna and United Healthcare insurance plans concerning payments and the administration of its health plan program, but its relationship with those companies worsened following the Union's communications with NJAHP which lobbies for those companies.

It should be noted that Dunaev first stated that the Hospital's dispute with Aetna began in December, 2010 before the Respondent purchased the hospital but then testified that that dispute began in late 2011 and 2012. She stated that she did not know if the dispute was related to the Union or some other issue. She noted that the Union met with Aetna, the DOBI, NJAHP, and that the Union provided the Hospital's financial information to the health plan administrators, questioning what relationship the Union had with the health care industry.

She attributed the Hospital's poor history of receipt of reimbursement of insurance payments to this negative publicity. She further noted that the Respondent has current litigation with those three insurance companies.

Dunaev attributed the employees' bounced paychecks to its changing banks. She stated that a flyer distributed to Secaucus residents portrayed the Hospital as having an unsafe working environment which was also unsafe to patients.

As set forth above, Hospital union president Dudsak was discharged in July, 2011 for distributing a flyer which was entitled "Wanted – Dead or Alive" which referred to the Hospital's implementation of MEWA which the Union believed was inferior to the insurance plan then in effect. Dunaev portrayed the Union's distributed materials as "threatening and aggressive to hospital management." A complaint was filed by the Union with the DOH at about the same time. Dunaev stated that at the same time the flyer was distributed the DOH conducted an inspection. At hearing, Dr. Lipsky and Dunaev alleged the coincidence of the timing of the inspection of a sterilizer whose maintenance records had not been current with the Dudsak grievance. It was Dr. Lipsky's belief that the Union engaged in "sabotage" – a "set up" in which the Union caused an employee with 34 years' experience at the facility to fail, for four weeks, to certify that she sterilized an important medical device. He cited as evidence the fact that upon their arrival the DOH inspectors immediately checked the sterilizer's certification documents. However, he conceded that the three-day inspection involved more than the sterilizer, in which other violations were found.

Although Dunaev testified that she sought to speak with Twomey and Dudsak about the Union's activities against the Hospital and was rebuffed by their refusal to meet, she conceded that she did not, in as many words, tell Twomey that the Union engaged in economic pressure activity. However, she told them that the Union's numerous attacks in the media and its complaints to agencies damaged the Hospital.

Dr. Lipsky stated that prior to entering negotiations or reaching agreement on the contract he had not read the Liberty contract or seen Article 7, but he read it before signing the contract. Further, he had not read the Liberty contract before he entered negotiations with the Union.

Dr. Lipsky stated that Article 7 was the "main reason" he entered negotiations with the Union and why he signed the contract. He believed that he was agreeing to a 5½ year "peace" with the Union, and he relied on Article 7 to provide that peace. He agreed that the Union's agreement not to engage in strikes or picketing was a part of that promise, but that the "main thing" was the Union's promise not to engage in economic pressure activity, a promise, he maintained, the Union has not kept.

In agreement with Dunaev's testimony, Dr. Lipsky stated that the Union "constantly violated" its promise not to engage in economic pressure activity. He asserted that Twomey attempted to "dig up some kind of dirt" on him, especially after the Harris arbitration.

Dr. Lipsky related that there were "endless nasty articles," noting that the owners were "bad," the conditions were terrible and that the Hospital was in "terrible financial shape." The

Union made "continuous" complaints to the DOH, causing 65 inspections by that agency, all of which were "initiated" by the Union. He conceded, however, that a complaint may be made by anyone - an employee, a patient, a family member or a community member.

In particular, Dr. Lipsky claimed that it was a "well-known fact," later amended that it is his firm belief, that the Union initiated every investigation of the Hospital undertaken by the DOH.

He noted that the Hospital successfully passed all, later amended to "nearly all" the DOH inspections.

Dr. Lipsky faulted the Union for requesting and receiving the Hospital's 2011 financial information from the DOH and "dissecting" that data at a meeting with the NJAHP where it asked those present to relate what they knew about the Hospital. He stated that the meeting resulted in each of the health plans becoming aware of the amounts of the payments to the Hospital that each makes. Dr. Lipsky surmised that, after analyzing the Hospital's data, the Union "wonders" how it can "criminalize our practice."

Dr. Lipsky concluded that the Union's dissemination of such "exceptionally sensitive proprietary information" constituted economic pressure activity because, since each insurance company knows how much it and others pay the Hospital, each may negotiate lower payments causing a "major impact" on the Hospital which constitutes the difference between "life and death" for its financial existence.

The Union also obtained the Hospital's balance sheet through an OPRA request. The information included monthly cash forecasts, the Hospital's submission to the AG's office, the amount the Hospital's investors contributed to it and their percentage of ownership. In this regard, the Hospital complained to the DOH that it had inappropriately released the Hospital's financial information.

Dr. Lipsky stated that the Union sent emails to every major New Jersey insurance company, "dissected" the Hospital's finances, and was aware of "every single financial aspect of the Hospital's existence, with the result that the Union was aware of how much each insurer pays the Hospital, how much it can tolerate with the result that "the whole universe of insurance carriers is colluding to destroy us."

Dr. Lipsky characterized that meeting in which the Union "disseminated" the Respondent's information as an example of its engaging in economic pressure activity. He accused the union of "conspiring" with NJAHP to "corruptly influence Senator Weinberg" to introduce legislation to destroy the MEWA and by asking Senator Vitale for additional hearings on that issue. The Union's goal, in short, was to attempt to "criminalize" and "take down" the Hospital and himself, and harm the Hospital and none other.

Dr. Lipsky termed the Union's biggest "damage" to the Hospital as its participation in the destruction of the Hospital's MEWA plan. He stated that the employees' prior health insurance plan was not effective – it did not reimburse the Hospital for services rendered to its employees. When, after MEWA was approved in January, 2013, the Hospital tried to persuade the various health insurance brokers to accept MEWA, each one was "primed by the Union" and other insurance companies to reject it. As a result, none of them agreed to carry the Hospital's MEWA plan. After struggling for 1½ years through 2013 and most of 2014, the Respondent terminated its MEWA plan. Dr. Lipsky conceded that he had no evidence that the Union communicated with those insurance brokers but he was told that they would not do business with the Hospital because they were afraid that they would lose the Union's business if they did so.

Although Section 7.3 gives the Hospital the right to maintain an action for an injunction and damages resulting from the Union's violation of Article 7.1, Dr. Lipsky stated that the Hospital has not brought any such action as a result of the Union's alleged violation of that section.

Discussion

The Respondent argues that the Union's activities constitute "economic pressure activity" in violation of the no-strike clause of the parties' contract.

The contract does not contain a definition of "economic pressure activity." The General Counsel and the Union argue that the Union's activities in communicating with and enlisting the support of the media, advocacy groups, legislative bodies and government agencies were for the purpose of administering the contract and compelling regulating authorities to ensure that the Respondent complied with its financial obligations and its obligations to employees and patients. They contend that the Union's communications were the proper exercise of the Union's right to engage in protected activities in behalf of employees.

The Respondent argues that the Union's actions were destructive and vexatious, and served to undermine and disparage it to the public, agencies which regulate it, insurers it negotiates with, and potential patients.

Article 7.1 of the contract contains nine prohibited activities – strikes, sympathy strikes, boycotts, picketing, work stoppages, slowdowns, sit-ins, other interference with the operations of the Hospital, or other economic pressure activity.

First, the General Counsel and the Union contend that "economic pressure activity," being present in the same paragraph as the enumerated typical union weapons against management, must relate to actions taken against the Respondent at the workplace.

They argue that inasmuch as the Union's efforts all took place away from the premises the Union's actions could not interfere with the Hospital's operations.

In *Engelhard Corp*., 342 NLRB 46, 48 (2004), the Board held that in "interpreting a no-strike/no-lockout clause, the parties' actual intent governs, whether that intent is established by the language of the clause itself, by the inferences drawn from the contract as a whole, or by extrinsic evidence, citing *Silver State Disposal Service*, 326 NLRB 84, 86 (1998), quoting *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986).

In that case, the Board held that the union's picketing of the employer's shareholders' meeting 70 miles away from its plant was not prohibited by the contract's no-strike clause. Here, too, I cannot agree with the Respondent's argument that "economic pressure activity" must be viewed in isolation to the other enumerated actions in the clause.

Determining the parties' intent in including "economic pressure activity" in the no-strike clause was not illuminated by the hearing testimony. Twomey said that she knew the Union's intent in its inclusion since it was the Union's language that was proposed. Lipsky's testimony that the language was the *quid pro quo* for 5½ years of labor peace does not add anything to our understanding of the parties' intent in adding that clause to the contract. Respondent's counsel who was present at the negotiation did not testify. It seems that the clause was simply included because it was contained in the Liberty contract.

It is impossible to believe that the Union intended, in agreeing to the no-strike clause, to give up its constitutional right to advocate with government authorities in behalf of its views,

communicate with the press as to its dispute with the Respondent or to join with advocacy groups in support of its positions. But that is what the Respondent argues. It maintains that the Union waived its right to undertake those activities by agreeing not to engage in other economic pressure activity.

The Respondent maintains that the Union waived its right to communicate with these various organizations by agreeing to the language in the no-strike clause prohibiting economic pressure activity. However, it has long been held that any waiver by a union of the statutory rights of represented employees must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 709 (1983). The no-strike clause did not specify what the parties intended to prohibit and there is no extrinsic evidence of the parties' intent in including the clause in the contract.

In *Mental Health Services, Northwest*, 300 NLRB 926, 927 (1990), a refusal to bargain case, the Board held that the respondent breached its bargaining obligation when it insisted to impasse that the union agree to language prohibiting the union and employees from interfering with the respondent's ability to obtain funding. The Board held that the employer's proposal unlawfully sought to prohibit the union's attempt to influence the employer's funding sources since it improperly constituted activities which might occur outside the workplace and outside the employment relationship, and also improperly sought to determine the union's position on a political issue. Neither objective is directly related to the employees' terms and conditions of employment.

There is substantial evidence that the Union engaged in an extensive effort to enlist public and private bodies to its legitimate causes. However, it appears that, in at least one instance, where Dr. Lipsky's divorce was researched, the Union went beyond what was needed to ensure the Hospital's financial stability and the welfare of patients and staff.

However, as set forth above, the Union unquestionably engaged in legally permissible activities before legislative bodies, government agencies charged with oversight of the hospital's finances and operations, and advocacy groups. As credibly testified by the Union's witnesses, all of its activities sought positive goals to ensure the financial stability of the Hospital for the benefit of its patients and employees.

There is no evidence that any of the Union's efforts constituted economic pressure activity against the Respondent. Its arguments that defending against inspections conducted in the hospital caused it to make an expenditure of funds is a necessary cost of business. It cannot be said that complaints to the DOH should not be made or that the DOH should suspend its inspections for that reason.

As testified by the Union's witnesses, its efforts were directed at ensuring that the Hospital met its obligations to the community, patients and employees. It legitimately advocated against MEWA because it believed that it provided inferior benefits to that provided by the original insurance plan. As found above, the new plan did not maintain substantially comparable benefit levels to that of the original plan as required by the contract.

The Union's contacts with the press consisted of information which the Union obtained from public sources and published in its website which, according to Dunaev, constituted truthful but negative publicity. The Union supported legislation which resulted in the passage of CHAPA which ensures that for-profit hospitals act in the best interests of the public. It also advocated for the passage of a "Certificate of Need" process in which the DOH monitors the sale of the assets

of a hospital. Further, the information the Union shared with advocacy groups was obtained by OPRA requests or was received from the Hospital.

In *Murphy Oil USA, Inc.,* 361 NLRB No. 72, slip op. at 16 (2014), the Board stated that "the Section 7 right to act concertedly for mutual aid and protection is not limited to supporting a labor union and pursuing collective bargaining with employers. The Supreme Court has made clear that Section 7 protects employees 'when they seek to improve working conditions through resort to administrative and judicial forums. . . .' quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Court stated that "Congress knew well enough that labor's cause is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context" and that failing to protect such conduct "could 'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.'"

In *Georgia Power Co*., 325 NLRB 420, 421 (1998), the Board held that where the respondent claimed that the union waived its right to bargain over changes in retirement benefits, such "waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable…. either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter."

Here, the Respondent has not made such a showing. The no-strike clause in general, and the phrase "economic pressure activity" does not clearly and unmistakably waive the Union's right to communicate with the groups set forth above. Nor does the evidence show that the matter was fully discussed and consciously explored or that the Union consciously yielded or clearly and unmistakably waived its interest in the matter.

It must be noted that the no-strike clause expressly prohibits economic pressure activity engaged in by employees and subjects them to immediate discharge, injunctive action and damages for its violation.

If the Respondent's interpretation of the clause is accepted, and if the employees engaged in the same activities as the Union, they may be immediately discharged, and are subject damages and injunctive action. Thus, in an effort to promote legislation and cause government agencies to more effectively monitor the Hospital employees would be prohibited from communicating with the news media, lawmakers, government agencies and advocacy groups.

Such a result is contrary to the law. The Board has consistently held that employee communications to third parties relating to a labor dispute or terms and conditions of employment are protected. *Ford Motor Co*., 233 NLRB 698, 699 (1977); *Magnavox Co*., 195 NLRB 265, 266 (1972).

In *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-1253 (2007), a case involving employee communications to outside organizations such as newspaper reporters, the Board stated that in the health care field, patient welfare and working conditions are often inextricably intertwined. Employees' statements regarding patient care and/or staffing levels have been found protected where it was clear from the context of the statements that they related to a labor dispute and/or employees' terms and conditions of employment.

Such communications to third parties are protected unless they are "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection. *Emarco, Inc.*, 284 NLRB 832, 833 (1987). The Board is careful, however, "to distinguish between disparagement of an

employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co*., 263 NLRB 136, 139 (1982). To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence "a malicious motive." *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue.

In addition, the Board has held that an employer may not refuse to bargain with a union which has violated the contract's no-strike clause. It stated that the "unclean hands" doctrine is not a defense to allegations of unfair labor practices. *Crimptex, Inc.,* 211 NLRB 855, 857 (1974).

The Respondent relies on *United Elastic Corp*., 84 NLRB 768, 776 (1949); *Arundel Corp.,* 210 NLRB 525 (1974), and *Laura Modes*, 144 NLRB 1592 (1963) in support of its affirmative defense.

In *United Elastic,* the union struck in violation of the parties' no-strike clause. The Board held that the employer's "statutory obligation to bargain with the union, at least with respect to matters related to the strike, was suspended as long as such wrongful strike action continued."

Here, the Respondent refused to bargain with the Union, as alleged, on matters wholly unrelated to the Union's alleged violation of the no-strike clause. The Board, although affirming the employer's right to terminate the contract because of the union's strike, noted that the contract had already been suspended. In that case an actual strike occurred, unlike the situation here.

Member Houston's observation, in dissent, is appropriate to the facts in the instant case. "These facts convince me that the respondent quickly used what it considered a technical right to relieve itself of its obligation to bargain." 84 NLRB at 783.

Arundel is easily distinguished from the facts here. First, and most importantly, the employees engaged in an actual strike, a stoppage of work, at the job site, in violation of the parties' no-strike clause. The Board held that such action was a "material refusal to perform." The Board held that the employer was under no obligation to meet and bargain with the union as long as the strike continued.

The employer in that case conditioned its bargaining on the suspension of the strike. Upon the conclusion of the strike the employer would continue bargaining concerning certain contract reopener issues. Here, the Respondent flatly argues that it had no obligation to bargain at all because of the Union's alleged breach of the no-strike clause. However, no contract reopener issues are involved here, and there are no issues concerning the continuation of bargaining which a cessation of the strike may lead to.

In *Laura Modes,* the Board withheld a bargaining order because of the union's violent picket line violence. Here, of course there was no strike and no violent strike. The Board has held that the absence of violence is an acceptable reason for not applying *Laura Modes*. See *Fairview Hall Convalescent Home*, 206 NLRB 688 at 689 (1973), enfd. in relevant part 520 F.2d 1316 (2d Cir. 1975). See also *World Carpets*, 188 NLRB 122 (1971); *Cascade Corp.*, 192 NLRB 533 (1971).

In *St. John's Hospital*, 281 NLRB 1163, 1174-1175 (1986), the Board ordered the respondent to bargain even where the union disparaged the employer in letters directed to interested organizations, to the struck employer's directors, and the public in a television

interview. The Board noted that in cases involving nonviolent misconduct, it has been reluctant to extend the *Laura Modes* precedent.

In *Electrical Workers, IBEW Local 1791 (Marathon Electric Mfg. Corp.),* 106 NLRB 1171, 1180–81 (1953), the Board held that following the union's strike in violation of the parties' no-strike clause, the employer did not violate the Act by unilaterally canceling the collective-bargaining agreement. In that case an actual strike, at the employer's premises prompted the employer's conduct. Here, no strike took place.

In addition, there must be a nexus between the Union's violation of the no-strike clause and the Respondent's refusal to bargain. In *Greyhound Lines*, 319 NLRB 554, 557 (1995), the Board held that "in contrast with the above evidence of nexus between asserted violence and employer conduct alleged to be unlawful, the respondent's broad-based affirmative defense allegations concerning violence have no basis in reason or in the relevant case law. In short, an alleged employer bargaining violation is not excused by union violence absent some rational connection between the two."

Here, there was no connection whatsoever between the Union's alleged violation of the no-strike clause and the Respondent's refusal to bargain. In refusing to bargain with the Union over the numerous issues set forth above, the Respondent did not assert that it was doing so because of the Union's alleged breach of the no-strike clause.

The Respondent cites examples of alleged economic pressure activity as the Union's (a) OPRA requests for information concerning the Respondent's attempt to establish and operate ambulatory surgical centers in New Jersey and its OPRA requests to the DOH for financial and licensing information for the Respondent (c) investigation of the Respondent's attempt to conduct business in Florida (d) a communication with the ICNJ regarding the Respondent's lawsuit with an insurance company which involved Dr. Lipsky's filing of allegedly fraudulent medical claims (e) research of criteria used by the DOH for granting a certificate of need for a hospital and research of the Respondent's certificate of need (f) research into the certificate of need for a medical day care center owned by Dr. Lipsky and (g) research as to a former investor of the Hospital and its current investors, some of whom might have "questionable backgrounds…." Brief, p, 9.

The above represent legitimate inquiries by the Union which represents a large number of employees at the Hospital. The research involves information which was available to the public through OPRA requests and other information the Respondent supplied to the Union. The data relates directly to the Respondent's operations and the activities of its owners and investors as they affect the Respondent's operations and its patients and employees.

As set forth above, Rubenstein testified that the Union sought to obtain a "fuller understanding" of who the Hospital's owners and investors were, and whether the Hospital's funds were being "diverted" to those investors who had a "bad track record." The Union sought to determine whether there was a relation between those circumstances and the alleged violations of the contract – the bouncing of employees' paychecks, the failure to pay employees' medical insurance bills, and the lack of sufficient equipment for use by the Hospital's staff.

There was testimony that the Union investigated at the Hospital and its finances so that the Union could protect the employees, patient care and the Hospital. Records concerning the Hospital, and its owners as the fiduciary holders of the facility were examined concerning their finances, track records with regulatory agencies, union histories, compensation given to their executives, other businesses they were involved with and lawsuits filed against them.

These inquiries were legitimate, lawful probes of the Hospital which represented a positive effort, not a negative effort, to ensure that the Hospital's fiduciaries were responsibly leading the facility.

The Respondent claims that the Union used the research it obtained to cause NJHCQUI to demand that the DOH place a temporary monitor or manager at the Respondent's facility. It also contends that the Union caused NJA to ask the DOH to oversee the finances of the Respondent.

I cannot find that the actions of the Union constituted economic pressure activity against the Respondent. It believed, based on the research that it had conducted, that the Respondent's finances were questionable. It sought, through the various advocacy groups, that the government agencies responsible for oversight into the Hospital's operations, look into the matter. It was the responsibility of those agencies, not the Union or the advocacy groups, to determine whether or not financial safeguards be put in place at the Hospital.

It was the government agencies, not the Union, that decided to appoint a monitor and then a manager, and it was the DOH, not the Union, that decided to conduct inspections of the Hospital.

The Union legitimately inquired as to whether Dr. Lipsky, the board chairman of the Respondent hospital was licensed to practice medicine in New Jersey.

The Respondent also argues that the Union's meeting with industry groups NJAHP, NJHCQI, ICNJ concerning the Respondent's financial and licensing information which the Union obtained through an OPRA request to the DOH was improper. The evidence concerning that meeting show only that the Union brought its concerns about these matters and alleged intimidation and a hostile work environment to the attention of those groups. The Union also allegedly informed them of the Respondent's alleged hostility toward whistle-blowers, lack of satisfaction with DOH resolution of its complaints, and that the Respondent has not provided an audited financial statement to the State of New Jersey as required.

Rather than demonstrate a "conspiracy" by the Union to destroy the Respondent, these efforts were undertaken, as testified by the Union's witnesses, to look into the Respondent's operations with a view toward correcting any alleged improper practices.

I cannot find that the Union, in participating in that meeting or making the claims it allegedly did, engaged in economic pressure activity. It believed that the Hospital's financial obligation to patients and its employees was compromised and sought help in bringing this evidence to the proper regulatory bodies. It is the business of the groups the Union met with to be concerned with these issues.

I acknowledge that the Union delved into areas that were not its concern such as Dr. Lipsky's divorce. But the overwhelming evidence supports a finding that its inquiries were legitimate.

The Respondent claims that the advocacy groups, at the Union's behest, petitioned for the termination of the Respondent's MEWA. It contends that those groups, at the Union's request, petitioned various legislators to introduce legislation aimed at destroying MEWA.

Here, too, I cannot find that by bringing the Union's concern that the MEWA was detrimental to the employees it represented constituted economic pressure activity. Ultimately, it was the legislature and not the Union which properly considered the bill terminating MEWA and passed it.

The Respondent also contends that the Union engaged in economic pressure activity by its contact with the news media. It contends that Twomey was quoted complaining that while partners take millions in profits and fees the Hospital laid off staff and cut services. The Respondent also faults the Union for sharing information its research revealed to the media and calling for the appointment of an independent financial monitor because it has refused to comply with state and federal law.

These actions constitute the Union's legitimate presentation of validly held beliefs to the media of the alleged effect of the Respondent's actions on the Hospital's patients and employees. They do not constitute economic pressure activity.

I therefore find and conclude that the Union did not engage in economic pressure activity. I further find that it did not violate the no-strike clause of the parties' contract. I accordingly find and conclude that the Respondent has not proven its affirmative defense, and that the Respondent was not, at any time, relieved of its obligation to bargain with the Union.

Conclusions of Law

1. The Respondent, MHA, LLC d/b/a Meadowlands Hospital Medical Center, is an employer engaged in commerce and an employer within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, Health Professional and Allied Employees, AFT/AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been and is the exclusive collective-bargaining representative of the Respondent's employees in separate contracts covering a unit of Registered Nurses, a unit of Technical Employees and a unit of Service employees.

4. The Respondent has violated Section 8(a)(1) of the Act by threatening employees with the closure of the Rehabilitation Unit if its employees engaged in union activities.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by selecting employees to be laid off without affording the Union an opportunity to bargain with the Respondent with respect to the criteria to be used for selecting employees to be laid off and without affording the Union an opportunity to bargain over the effects of the layoff.

6. The Respondent has violated Section 8(a)(5) and (1) of the Act by assigning the work of Service Unit employees to non-unit per diem employees without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

7. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the DNV Inspection Report from February, 2013, and information concerning Veritas.

8. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the RN and Technical Contracts by eliminating its employees' 12-hour shifts.

9. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the RN Contract by refusing to apply the RN Contract to Registered Nurse Interns.

10. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to make contributions to employees' 401(k) plans.

11. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by failing to allow Union representatives to meet with employees in the cafeteria.

12. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by failing to offer bumping and recall rights to laid off employees.

13. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to apply the Service Contract to Hospital Assistants.

14. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the Service Contract by refusing to apply the Service Contract to Nursing Assistant Interns.

15. The above unfair labor practices affect commerce within the meaning of Section 2(6) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has failed to bargain with the Union by failing and refusing to furnish the Union with the DNV Inspection Report from February, 2013, and information concerning Veritas, it shall be ordered to provide those documents to the Union.

Having found that the Respondent has failed to bargain with the Union by selecting employees to be laid off without affording the Union an opportunity to bargain with the Respondent with respect to the criteria to be used for selecting employees to be laid off and without affording the Union an opportunity to bargain over the effects of the layoff, it shall be ordered to do bargain with the Union in good faith over that subject.

Having found that the Respondent has failed to bargain with the Union by assigning the work of Service Unit employees to non-unit per diem employees without prior notice to the Union and without affording the union an opportunity to bargain with Respondent with respect to this conduct, it shall be ordered to bargain with the Union in good faith over that subject. Employees adversely affected by such assignment shall be made whole as set forth below.

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the RN and Technical Contracts by eliminating employees' 12-hour shifts it shall be ordered to reinstate that part of the contracts.

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the RN Contract by refusing to apply the RN Contract to Registered Nurse Interns, it shall be ordered to do so and make the Registered Nurse Interns whole as set forth below. *El Vocero de Puerto Rico, Inc.,* 357 NLRB 1585, 1607 (2011).

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing got make contributions to employees' 401(k) plans of 2% of the Respondent's funds to each employee's salary it shall be ordered to do so.

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by failing to allow Union representatives to meet with employees in the cafeteria it shall be ordered to do so.

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by failing to offer bumping and recall rights to laid off employees it shall be ordered to do so. Employees adversely affected by the failure to offer them bumping and recall rights shall be made whole as set forth below. Uforma/Shelby Business Forms, Inc., 320 NLRB 71, 78(1995);

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to apply the Service Contract to Hospital Assistants it shall be ordered to do so and to compensate those employees as set forth below. *El Vocero de Puerto Rico, Inc.,* 357 NLRB 1585, 1607 (2011).

Having found that the Respondent has failed to bargain with the Union by failing to continue in effect all the terms and conditions of the Service Contract by refusing to apply the Service Contract to Nursing Assistant Interns, it shall be ordered to do so and to compensate those employees as set forth below. *El Vocero de Puerto Rico, Inc*., 357 NLRB 1585, 1607 (2011).

Some of the names of the employees who have been affected by the Respondent's unlawful refusal to continue in effect all the terms of the contracts as set forth above have been set forth in the record and have been set forth in this Decision. Those employees are the RN Interns, GC Exhibit 128, and those employees who have been denied bumping and recall rights, GC Exhibit 157-163.

However, the names of other employees such as the Hospital Assistants and Nursing Assistant Interns have not been placed in the record. Inasmuch as the names of some employees are known and the names of other employees are not part of the record, I have omitted from the Order the names of all the employees who have been affected by the Respondent's unlawful actions. I leave to the Compliance phase of this case to determine the identity of all employees who have been affected by the Respondent's unlawful actions as set forth above.

As to all such employees I shall order the Respondent to make them whole for nay loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful actions against them.

Backpay for the employees adversely affected by the Respondent's unlawful refusal to continue in effect the terms of the three contracts, as set forth above, shall be computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in New Horizons, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

I shall also order the Respondent to compensate employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 22 allocating backpay to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016).

The Respondent, having unlawfully failed to contribute 2% of the Respondent's funds to each employee's 401(k) plan, the Respondent must make whole all affected employees by contributing that sum for each payroll period from December 7, 2010, the effective date of the collective-bargaining agreement into which it entered with the Union, plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, MHA, LLC d/b/a Meadowlands Hospital Medical Center, Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the closure of the Rehabilitation Unit if its employees engaged in union activities.

(b) Refusing to apply the RN Contract to Registered Nurse Interns.

(c) Selecting employees to be laid off without affording the Union an opportunity to bargain with the Respondent with respect to the criteria to be used for selecting employees to be laid off and without affording the Union an opportunity to bargain over the effects of the layoff.

(d) Assigning the work of Service Unit employees to non-unit per diem employees without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to such conduct.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Failing and refusing to furnish the Union with the DNV Inspection Report from February, 2013, and information concerning Veritas which the Union requested in its letter of April 17, 2013.

(f) Failing to continue in effect all the terms and conditions of the RN and Technical Contracts by eliminating employees' 12-hour shifts.

(g) Failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to make a 2% contribution of the Respondent's funds to employees' 401(k) plans.

(h) Failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by failing to allow Union representatives to meet with employees in the cafeteria.

(i) Failing to continue in effect all the terms of the RN, Technical and Service Contracts by failing to offer bumping and recall rights to laid off employees.

(j) Failing to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to apply the Service Contract to Hospital Assistants.

(k) Failing to continue in effect all the terms and conditions of the Service Contract by refusing to apply the Service Contract to Nursing Assistant Interns.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the appropriate collective bargaining units concerning terms and conditions of employment as set forth in the RN Contract, and the Technical and Service Contracts.

(b) Immediately provide the Union with the DNV Inspection Report from February, 2013, and the information requested by the Union concerning Veritas in its letter of April 17, 2013.

(c) Continue in effect the terms of the RN,Technical and Service Contracts by reinstating the 12-hour shifts of employees set forth in those contracts and make whole the employees adversely affected by its elimination.

(d) Apply the RN contract to Registered Nurse Interns and make whole the employees adversely affected by its elimination.

(e) Make a 2% contribution of the Respondent's funds to each of its employees' 401(k) plans effective October 1, 2012.

(f) Rescind its refusal to allow Union representatives to meet with employees in the cafeteria.

(g) Allow Union representatives to meet with employees in the cafeteria.

(h) Offer bumping and recall rights to employees in the RN, Technical and Service Contracts and make whole the employees adversely affected by the Respondent's failure to offer those rights to its employees.

(i) Apply the Service Contract to Hospital Assistants.

(j) Apply the Service Contract to Nursing Assistant Interns.

(k) Make whole the employees adversely affected by the Respondent's actions, as set forth above, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Within 14 days after service by the Region, post at its facility in Secaucus, New Jersey, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2012.

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 20, 2016

Steven Davis
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with the closure of the Rehabilitation Unit if you engaged in union activities.

WE WILL NOT refuse to apply the Registered Nurses Contract to Registered Nurse Interns.

WE WILL NOT select you to be laid off without affording the Union an opportunity to bargain with us with respect to the criteria to be used for selecting you to be laid off and without affording the Union an opportunity to bargain over the effects of the layoff.

WE WILL NOT assign the work of Service Unit employees to non-unit per diem employees without prior notice to the Union and without affording the Union an opportunity to bargain with us with respect to this conduct.

WE WILL NOT fail and refuse to furnish the Union with the DNV Inspection Report from February, 2013, and information concerning Veritas.

WE WILL NOT fail to continue in effect all the terms and conditions of the RN and Technical Contracts by eliminating your 12-hour shifts.

WE WILL NOT fail to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to make contributions to your 401(k) plans.

WE WILL NOT fail to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by failing to allow Union representatives to meet with you in the cafeteria.

WE WILL NOT fail to continue in effect all the terms of the RN, Technical and Service Contracts by failing to offer bumping and recall rights to laid off employees.

WE WILL NOT fail to continue in effect all the terms and conditions of the RN, Technical and Service Contracts by refusing to apply the Service Contract to Hospital Assistants.

WE WILL NOT fail to continue in effect all the terms and conditions of the Service Contract by refusing to apply the Service Contract to Nursing Assistant Interns.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union as your exclusive representative in the appropriate collective bargaining units concerning terms and conditions of employment as set forth in the RN Contract, and the Technical and Service Contracts.

WE WILL immediately provide the Union with the DNV Inspection Report from February, 2013, and the information requested by the Union concerning Veritas in its letter of April 17, 2013.

WE WILL reinstate your 12-hour shifts as set forth in the RN, Technical and Service contracts and make you whole if you were adversely affected by our elimination of the 12-hour shifts.

WE WILL apply the RN contract to Registered Nurse Interns and make you whole if you were adversely affected by our failure to include you in that contract.

WE WILL make a 2% contribution of our funds to each of your 401(k) plans, effective October 1, 2012 and make you whole for our failure to make such contributions.

WE WILL rescind our refusal to allow Union representatives to meet with you in the cafeteria.

WE WILL allow Union representatives to meet with you in the cafeteria.

WE WILL offer bumping and recall rights to you in the RN, Technical and Service Contracts and make you whole if you were adversely affected by our failure to offer those rights to you.

WE WILL apply the Service Contract to Hospital Assistants and make you whole if you were adversely affected by our failure to include you in that contract.

WE WILL apply the Service Contract to Nursing Assistant Interns and make you whole if you were adversely affected by our failure to include you in that contract.

MHA, LLC d/b/a MEADOWLANDS HOSPITAL CENTER

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's

Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-086823 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.